

# NORTH CAROLINA



## REGISTER

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September 4, 2001

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**NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM**

*The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.*

**TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE**

<b>TITLE</b>	<b>DEPARTMENT</b>	<b>LICENSING BOARDS</b>	<b>CHAPTER</b>
1	Administration	Acupuncture	1
2	Agriculture	Architecture	2
3	Auditor	Athletic Trainer Examiners	3
4	Commerce	Auctioneers	4
5	Correction	Barber Examiners	6
6	Council of State	Certified Public Accountant Examiners	8
7	Cultural Resources	Chiropractic Examiners	10
8	Elections	Employee Assistance Professionals	11
9	Governor	General Contractors	12
10	Health and Human Services	Cosmetic Art Examiners	14
11	Insurance	Dental Examiners	16
12	Justice	Dietetics/Nutrition	17
13	Labor	Electrical Contractors	18
14A	Crime Control & Public Safety	Electrolysis	19
15A	Environment and Natural Resources	Foresters	20
16	Public Education	Geologists	21
17	Revenue	Hearing Aid Dealers and Fitters	22
18	Secretary of State	Landscape Architects	26
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**Note:** Title 21 contains the chapters of the various occupational licensing boards.

**NORTH CAROLINA REGISTER**  
 Publication Schedule for July 2000 – June 2001

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
volume & issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	non-substantial economic impact			substantial economic impact			270 <sup>th</sup> day from issue date
					end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	
15:13	01/02/01	12/07/00	03/15/01	01/17/01	02/01/01	02/20/01	05/00/02	03/05/01	03/20/01	05/00/02	09/29/01
15:14	01/16/01	12/20/00	04/02/01	01/31/01	02/15/01	02/20/01	05/00/02	03/19/01	03/20/01	05/00/02	10/13/01
15:15	02/01/01	01/10/01	04/02/01	02/16/01	03/05/01	03/20/01	05/00/02	04/02/01	04/20/01	05/00/02	10/29/01
15:16	02/15/01	01/25/01	05/01/01	03/02/01	03/19/01	03/20/01	05/00/02	04/16/01	04/20/01	05/00/02	11/12/01
15:17	03/01/01	02/08/01	05/01/01	03/16/01	04/02/01	04/20/01	05/00/02	04/30/01	05/21/01	05/00/02	11/26/01
15:18	03/15/01	02/22/01	05/15/01	03/30/01	04/16/01	04/20/01	05/00/02	05/14/01	05/21/01	05/00/02	12/10/01
15:19	04/02/01	03/12/01	06/01/01	04/17/01	05/02/01	05/21/01	05/00/02	06/01/01	06/20/01	05/00/02	12/28/01
15:20	04/16/01	03/26/01	06/15/01	05/01/01	05/16/01	05/21/01	05/00/02	06/15/01	06/20/01	05/00/02	01/11/02
15:21	05/01/01	04/10/01	07/02/01	05/16/01	05/31/01	06/20/01	05/00/02	07/02/01	07/20/01	05/00/02	01/26/02
15:22	05/15/01	04/24/01	07/16/01	05/30/01	06/14/01	06/20/01	05/00/02	07/16/01	07/20/01	05/00/02	02/09/02
15:23	06/01/01	05/11/01	08/01/01	06/18/01	07/02/01	07/20/01	05/00/02	07/31/01	08/20/01	05/00/02	02/26/02
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16:01	07/02/01	06/11/01	09/04/01	07/17/01	08/01/01	08/20/01	05/00/02	08/31/01	09/20/01	05/00/02	03/29/02
16:02	07/16/01	06/22/01	09/17/01	07/31/01	08/15/01	08/20/01	05/00/02	09/14/01	09/20/01	05/00/02	04/12/02
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16:04	08/15/01	07/25/01	10/15/01	08/30/01	09/14/01	09/20/01	05/00/02	10/15/01	10/22/01	05/00/02	05/12/02
16:05	09/04/01	08/13/01	11/15/01	09/19/01	10/04/01	10/22/01	05/00/02	11/05/01	11/20/01	05/00/02	06/01/02
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16:08	10/15/01	09/24/01	12/17/01	10/30/01	11/14/01	11/20/01	05/00/02	12/14/01	12/20/01	05/00/02	07/12/02
16:09	11/01/01	10/11/01	01/02/02	11/16/01	12/03/01	12/20/01	05/00/02	12/31/01	01/21/02	05/00/02	07/29/02
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16:12	12/17/01	11/26/01	02/15/02	01/02/02	01/16/02	01/22/02	05/00/02	02/15/02	02/20/02	05/00/02	09/13/02

## EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

### GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

**COMPUTING TIME:** In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

### FILING DEADLINES

**ISSUE DATE:** The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

**LAST DAY FOR FILING:** The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

### NOTICE OF RULE-MAKING PROCEEDINGS

**END OF COMMENT PERIOD TO A NOTICE OF RULE-MAKING PROCEEDINGS:** This date is 60 days from the issue date. An agency shall accept comments on the notice of rule-making proceeding until the text of the proposed rules is published, and the text of the proposed rule shall not be published until at least 60 days after the notice of rule-making proceedings was published.

**EARLIEST REGISTER ISSUE FOR PUBLICATION OF TEXT:** The date of the next issue following the end of the comment period.

### NOTICE OF TEXT

**EARLIEST DATE FOR PUBLIC HEARING:** The hearing date shall be at least 15 days after the date a notice of the hearing is published.

**END OF REQUIRED COMMENT PERIOD**  
**(1) RULE WITH NON-SUBSTANTIAL ECONOMIC IMPACT:** An agency shall accept comments on the text of a proposed rule for at least 30 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

**(2) RULE WITH SUBSTANTIAL ECONOMIC IMPACT:** An agency shall accept comments on the text of a proposed rule published in the Register and that has a substantial economic impact requiring a fiscal note under G.S. 150B-21.4(b1) for at least 60 days after publication or until the date of any public hearing held on the rule, whichever is longer.

**DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION:** The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

**FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY:** This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

*This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.*

**STATE BOARD OF ELECTIONS**

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GARY O. BARLETT  
Director

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July 26, 2001

Ms. Glenda Clendenin, Director  
Moore County Board of Elections  
PO Box 787  
Carthage, NC 28327

Re: Your July 3, 2001 request for an opinion

Dear Ms. Clendenin:

This letter contains an opinion of this office pursuant to GS 163-278.23.

The answer to your first question is that it is permissible for a PAC to organize for the sole purpose of supporting a candidate. The fact that there is a candidate's committee already formed is not relevant.

A PAC can only contribute up to \$4000 per election to a candidate. An election is considered as a primary, second primary (if on the ballot), a run-off election, and an election to fill a vacancy, and a general election. (See GS 163.278.6(8)) So it is possible to give up to \$12,000 to a candidate goes through a primary, second primary, and a general election.

As to your question about possible in-kind contributions when a PAC makes expenditures for a candidate, the expenditure aren't treated as in-kind if they are independent expenditures. However if the expenditures were coordinated, those expenditures from a PAC, even one controlled by a candidate or a group of candidates, must be shown in-kind on the one or more of candidate's committee report. A coordinated expenditure benefiting more than one candidate will have to reported in-kind on each benefited candidate's report and properly noted in the PAC report.

It is permissible for a candidate to allow a PAC to handle campaign activities as long as the contributions and expenditures are fully reported. However, the \$4,000 contribution limitation would apply.

If expenditures and other campaign efforts by a PAC, group, or individuals benefit a candidate, and are performed in coordination with that candidate's campaign, then those expenditures will be counted toward the \$4,000 contribution limit. In other words, a person or PAC could not spend \$3,000 on a coordinated mailing for a candidate and then contribute \$4,000 on top of that. The later contribution would be limited to \$1,000 the remaining balance of the \$4,000 contribution limits after the \$3,000 coordinated mailing. If the PAC makes an expenditure that benefits more than one candidate, then the coordinated expenditure is offset against the \$4,000 contribution limitation of each candidate benefited. So if the mailing referred to above supports three candidates, then \$3000 is offset against the \$4,000 limit that the PAC may give each of the three candidates. Again, the reporting requirements will mandate that each of the candidates reports must show this as a contribution and the PAC report must show it as an expenditure benefiting more than one candidate.

Expenditures by PACs, groups, or persons that may benefit a candidate, but are not done in coordination with that candidate's campaign are independent expenditures and not subject to the \$4,000 contribution limit. However, GS 163-278.12 requires the reporting of independent expenditures in excess of \$100. The general prohibition against campaign contributions by corporations and business entities would apply to coordinated expenditures and independent expenditures.

Who determines what is coordinated or independent? The elections office in which the campaign must file its reports determines the issue, and this issue must be studied on a case by case basis. As a general rule, in order to find coordinated expenditures, there must

*IN ADDITION*

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have been some prior communication between the provider of the expenditure and the candidate. For instance, a citizen sends a candidate a print ad he plans to run to a candidate, asking for the candidate's review of the ad. The candidate makes a change in the ad, and sends it back. That has become a coordinated expenditure. But if the candidate received the unsolicited ad for review and does nothing, then if the ad is run, it continues to be an independent expenditure. If a county office has questions or concerns on these type issues, the State Board of Elections office will offer advice upon request.

Based upon recent court decisions involving our office, it appears that groups that deal with issue advocacy and do not expressly ask voters to or not to "vote" or "support" a candidate, are not considered PACs and do not have to file as a PAC or report their activities. Again, this office would be more than happy to consider any situation that might present itself to your office.

Sincerely,

Gary O. Bartlett  
Executive Secretary-Director

STATE BOARD OF ELECTIONS  
6400 Mail Service Center ? Raleigh, NC 27699-6400

GARY O. BARLETT  
Director

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July 26, 2001

Ms. Becki Gray  
House Minority Leader's Office  
NC House of Representatives  
Raleigh, NC

RE: GS 163-278.13B

Dear Ms. Gray:

This letter contains an opinion of this office being reported as per GS 163-278.23. The prohibition against fund-raising during the General Assembly session is found in GS 163-278.13B, parts of which are set below.

**163-278.13B. Limitation on fund-raising during legislative session.**

(a) Definitions. – For purposes of this section:

- (1) "Limited contributor" means a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes, that lobbyist's agent, that lobbyist's principal as defined in G.S. 120-47.1(7), or a political committee that employs or contracts with or whose parent entity employs or contracts with a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes.
- (2) "Limited contributee" means a member of or candidate for the Council of State, a member of or candidate for the General Assembly.
- (3) The General Assembly is in "regular session" from the date set by law or resolution that the General Assembly convenes until the General Assembly either adjourns sine die or recesses or adjourns for more than 10 days.
- (4) A contribution is "made" during regular session if the check or other instrument is dated during the session, or if the check or other instrument is delivered to the limited contributee during session, or if the limited contributor pledges during the session to deliver the check or other instrument at a later time.
- (5) A contribution is "accepted" during regular session if the check or other instrument is dated during the session, or if the limited contributee receives the check or other instrument during session and does not return it within 10 days, or agrees during session to receive the check or other instrument at a later time.

(b) Prohibited Solicitations. – While the General Assembly is in regular session, no limited contributee or the real or purported agent of a limited contributee shall:

- (1) Solicit a contribution from a limited contributor to be made to that limited contributee or to be made to any other candidate, officeholder, or political committee; or
- (2) Solicit a third party, requesting or directing that the third party directly or indirectly solicit a contribution from a limited contributor or relay to the limited contributor the limited contributee's solicitation of a contribution. It shall not be deemed a violation of this section for a limited contributee to serve on a board or committee of an organization that makes a solicitation of a limited contributor as long as that limited contributee does not directly participate in the solicitation and that limited contributee does not directly benefit from the solicitation.

(c) Prohibited Contributions. – While the General Assembly is in regular session:

- (1) No limited contributor shall make or offer to make a contribution to a limited contributee.
- (2) No limited contributor shall make a contribution to any candidate, officeholder, or political committee, directing or requesting that the contribution be made in turn to a limited contributee.
- (3) No limited contributor shall transfer any amount of money or anything of value to any entity, directing or requesting that the entity use what was transferred to contribute to a limited contributee.
- (4) No limited contributee or the real or purported agent of a limited contributee prohibited from solicitation by subsection (b) of this section shall accept a contribution from a limited contributor.
- (5) No limited contributor shall solicit a contribution from any individual or political committee on behalf of a limited contributee .....

It is important to note the definition of "limited contributor" and "limited contributee" which restricts the article's prohibition of giving to a registered lobbyist, that lobbyist's agent, the lobbyist's principal (who the lobbyists represents), or a political committee that

*IN ADDITION*

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employs or contracts with or whose parent entity employs or contracts with a registered lobbyist. A political committee of a legislator can not solicit funds, during a session, from a registered lobbyist or anyone that works for or has a registered lobbyist. A fundraiser that involves individuals, who are not lobbyists or work for or have hired lobbyists, during the current session, is allowable under the law.

Sincerely,

Gary O. Bartlett  
Executive Secretary - Director

**STATE BOARD OF ELECTIONS**  
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GARY O. BARLETT  
Director

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July 25, 2001

Attorney Steven B. Long  
Maupin, Taylor, and Ellis  
PO Box 19764  
Raleigh, NC 27619-9764

RE: Your Letter of July 16, 2001

Dear Mr. Long:

This letter contains an opinion of this office being reported as per GS 163-278.23.

There is no legal requirement under GS 163-278.7A or any other North Carolina election law or regulation that requires a separate bank account to support only the North Carolina activities of an FEC-registered PAC. The conclusion in your July 16, 2001 letter is correct under the current law.

If any of the circumstances set out in your recent letter changes, please contact this office.

Sincerely,

Gary O. Bartlett  
Executive Secretary-Director

**U.S. Department of Justice**

Civil Rights Division

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JDR:JBG:CMB:nj  
DJ 166-012-3  
2001-1754

*Voting Section  
P.O. Box 66128  
Washington, D.C. 20035-6128*

August 3, 2001

Richard J. Rose, Esq.  
Poyner & Spruill  
P.O. Box 353  
Rocky Mount, North Carolina 27802-0353

Dear Mr. Rose:

This refers to four annexations (Ordinance Nos. O-2001-8-0, O-2001-9, O-2001-24), their designation to wards, and the delay of the 2001 general election for the City of Rocky Mount in Edgecomb and Nash Counties, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on June 21, 2001.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

Joseph D. Rich  
Acting Chief  
Voting Section

## RULE-MAKING PROCEEDINGS

A Notice of Rule-making Proceedings is a statement of subject matter of the agency's proposed rule making. The agency must publish a notice of the subject matter for public comment at least 60 days prior to publishing the proposed text of a rule. Publication of a temporary rule serves as a Notice of Rule-making Proceedings and can be found in the Register under the section heading of Temporary Rules. A Rule-making Agenda published by an agency serves as Rule-making Proceedings and can be found in the Register under the section heading of Rule-making Agendas. Statutory reference: G.S. 150B-21.2.

### TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

#### CHAPTER 03 – FACILITY SERVICES

**Notice of Rule-making Proceedings** is hereby given by NC Medical Care Commission in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

**Citation to Existing Rule Affected by this Rule-making:** 10 NCAC 03D .0800 - .3300. Other rules may be proposed in the course of the rule-making process.

**Authority for the Rule-making:** G.S. 131E-155.1; 131E-156; 131E-157(a); 131E-159(a); 131E-159(b); 131E-162; 143-507(a); 143-508; 143-509(3); 143-509(4); S.L. 1984, c. 1034, s. 98; S.L. 1983, c. 1034, v. 98; S.L. 2001, c. 211; S.L. 2001, c. 220

**Statement of the Subject Matter:** The NC Medical Care Commission plans to repeal 10 NCAC 03D .0801-.0808, .0901-.0926, .1001-.1004, .1101-.1104, .1201-.1206, .1301-.1302, .1401-.1403, .1501-.1503, .2001, .2101-.2106, .2201-.2203, .2301-.2303, .2401; adopt new rules at 10 NCAC 03D .2500 - .3300. These rules pertain to Emergency Medical Services. The purpose of this rule-making action is to respond to a recent action of the NC General Assembly whereby Session Laws 2001-211 and 2001-220 were passed.

**Reason for Proposed Action:** The NC General Assembly recently passed House Bill 452 (Session Law 2001-220) and House Bill 453 (Session Law 2001-211). These two pieces of legislation amend G.S. 143-56 and 143-540 to update EMS terminology, definitions, roles and responsibilities. As such, changes are needed to existing rules to ensure compliance with the new laws. The Commission is proposing to repeal existing rules and adopt new EMS rules.

**Comment Procedures:** Written comments concerning the rule-making action must be submitted to Mark Benton, Rule-making Coordinator, NC Division of Facility Services, 2701 Mail Service Center, Raleigh, NC 27699-2701.

### TITLE 12 – DEPARTMENT OF JUSTICE

#### CHAPTER 07 – PRIVATE PROTECTIVE SERVICES

**Notice of Rule-making Proceedings** is hereby given by the NC Private Protective Services Board in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of

this notice of rule-making proceedings and any comments received on this notice.

**Citation to Existing Rule Affected by this Rule-making:** 12 NCAC 07D .0200, .0300, .0400, .0500, .0600 - Other rules may be proposed in the course of the rule-making process.

**Authority for the Rule-making:** G.S. 74C-5(1)

**Statement of the Subject Matter:** The above-referenced provisions set forth the experience requirements for the various licenses by the Board. The Board is interested in changing the experience requirements for those licenses.

**Reason for Proposed Action:** The Screening Committee of the Private Protective Services Board, which is the committee charged with the duty of reviewing licensing applications for approval/denial, has reported to the Board the need to amend the experience requirements for those applying for licensure by the Board. The Board is interested in amending the rule to require more varied types of experience for each license.

**Comment Procedures:** Comments may be submitted to W. Wayne Woodard, Private Protective Services Board, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.

### TITLE 19A – DEPARTMENT OF TRANSPORTATION

#### CHAPTER 02 – DIVISION OF HIGHWAYS

**Notice of Rule-making Proceedings** is hereby given by NC Department of Transportation – Ferry Division in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

**Citation to Existing Rule Affected by this Rule-making:** 19A NCAC 02D .0532. Other rules may be proposed in the course of the rule-making process.

**Authority for the Rule-making:** G.S. 136-82; 136-84; 143B-100(j)

**Statement of the Subject Matter:** This Rule sets fees for the North Carolina Ferry System

**Reason for Proposed Action:** This Rule is proposed for amendment to increase ferry tolls which have remained at the present level since 1983. Toll revenues are returned to the Ferry Division to fund the ferry operating expenses such as employee salaries, fuel, maintenance, and new vessels.

***RULE-MAKING PROCEEDINGS***

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**Comment Procedures:** Any interested person may submit written comments on the proposed rule by mailing the comments to Emily Lee, NC DOT, 1501 Mail Service Center, Raleigh, NC 27699-1501 by December 16, 2001.

*This Section contains the text of proposed rules. At least 60 days prior to the publication of text, the agency published a Notice of Rule-making Proceedings. The agency must accept comments on the proposed rule for at least 30 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. The required comment period is 60 days for a rule that has a substantial economic impact of at least five million dollars (\$5,000,000). Statutory reference: G.S. 150B-21.2.*

**TITLE 04 – DEPARTMENT OF COMMERCE**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Commerce, Division of Community Assistance intends to adopt the rules cited as 04 NCAC 19L .2001-.2003 and amend the rules cited as 04 NCAC 19L .0103, .0401, .0403, .0407, .0501-.0502, .0802, .0901, .0911-.0912, .1002, .1701-.1703. Notice of Rule-making Proceedings was published in the Register on February 1, 2001.*

**Proposed Effective Date:** July 1, 2002

**Public Hearing:**

**Date:** September 19, 2001

**Time:** 3:00 p.m.

**Location:** Division of Community Assistance, 1307 Glenwood Ave., Raleigh, NC

**Reason for Proposed Action:** *The Division of Community Assistance wants to update current procedures to bring them in line with the annual action plan.*

**Comment Procedures:** *Written comments should be mailed to Gloria Nance-Sims, Division of Community Assistance, 4313 Mail Service Center, Raleigh, NC 27699-4313 by October 4, 2001. Oral comments will be accepted at the public hearing.*

**Fiscal Impact**

- State
- Local
- Substantive (≥\$5,000,000)
- None

**CHAPTER 19 – DIVISION OF COMMUNITY ASSISTANCE**

**SUBCHAPTER 19L – NORTH CAROLINA COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM**

**SECTION .0100 – GENERAL PROVISIONS**

**04 NCAC 19L .0103 DEFINITIONS**

- (a) "Act" means Title I of the Housing and Community Development Act of 1974, P.L. 93-383, as amended.
- (b) "Applicant" means a local government which makes application pursuant to the provisions of this Subchapter.
- (c) "CDBG" means the State-administered Community Development Block Grant Program.
- (d) "Chief Elected Official" of a local government means either the elected mayor of a city or the chairman of a county board of commissioners.
- (e) "Community Development Program" means the annual program of projects and activities to be carried out by the

applicant with funds provided under this Subchapter and other resources.

(f) "Department" means the North Carolina Department of Commerce.

(g) "Division" means the Department of Commerce's Division of Community Assistance.

(h) "HUD" means the U.S. Department of Housing and Urban Development.

(i) "Local Government" means any unit of general city or county government in the State.

(j) Low-income families are those with a family income of 50 percent or less of median-family income. Moderate-income families are those with a family income greater than 50 percent and less than or equal to 80 percent of median-family income. For purposes of such terms, the area involved and median income shall be determined in the same manner as provided for under the Act.

(k) "Low- and Moderate-Income Persons" means members of families whose incomes are within the income limits of low- and moderate-income families as defined in Paragraph (j) of this Rule.

(l) "Metropolitan Area" means a standard metropolitan statistical area, as established by the U.S. Office of Management and Budget.

(m) "Metropolitan City" means a city as defined by Section 102(a)(4) of the Act.

(n) "Project" means one or more activities addressing either:

- (1) community revitalization needs; or
- (2) economic development needs; or
- (3) development of housing for persons of low- and moderate-income; or
- (4) urgent needs of the ~~applicant.~~ applicant; or
- (5) infrastructure needs; or
- (6) scattered site housing.

(o) "Recipient" means a local government that has been awarded a Community Development Block Grant and executed a Grant Agreement with the Department.

(p) "Scattered site" means acquisition, clearance, relocation, historic preservation and building rehabilitation activities which benefit low or moderate income persons or eliminate specific conditions of blight or decay on a spot basis not located in a slum or blighted area.

(q) "Secretary" means the Secretary of Department of Commerce or his designee.

(r) "State" means the State of North Carolina.

(s) "Urban County" means a county as defined by Section 102(a)(6) of the Act.

(t) The definitions in this Rule apply to terms used in this Subchapter.

*Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.481 – 570.483.*

**SECTION .0400 – DISTRIBUTION OF FUNDS**

**04 NCAC 19L .0401 GENERAL**

(a) The Division shall designate specific due dates or open periods of time for submission of grant applications under each category, based on the amount of funds available and coordination with other federal program funding cycles. Urgent Needs applications may be submitted at any time.

(b) In cases where the Division makes a procedural error in the application selection process that, when corrected, would result in awarding a score sufficient to warrant a grant award, the Division may compensate that applicant at the earliest time sufficient funds become available or with a grant in the next funding cycle.

(c) Applicants may apply for funding under the grant categories of Community Revitalization, Housing Development, Scattered Site Housing, Community Empowerment, Infrastructure, Demonstration Projects, Urgent Needs, Needs, and Economic Development. Applicants shall not apply for Contingency funding. Contingency awards may be made to eligible applicants in any category.

*Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.483.*

**04 NCAC 19L .0403 SIZE AND USE OF GRANTS MADE TO RECIPIENTS**

(a) There is no minimum grant amount which applicants may request or be awarded. Grant awards made to any one recipient shall not exceed the following amount in each grant category: Community Revitalization: Concentrated Needs subcategory - seven hundred ~~fifty thousand dollars (\$750,000)~~ (\$700,000), Infrastructure ~~subcategory category - eight hundred fifty thousand dollars (\$850,000)~~ Infrastructure subcategory eight hundred fifty thousand dollars (\$850,000), and Scattered Site ~~subcategory category - four hundred thousand dollars (\$400,000)~~ category - four hundred thousand dollars (\$400,000) Housing Development - two hundred fifty thousand dollars (\$250,000); Urgent Needs - six hundred thousand dollars (\$600,000); Contingency - six hundred thousand dollars (\$600,000); ~~Community Empowerment implementation grant - seven hundred fifty thousand dollars (\$750,000).~~ Applicants shall not have a project or combination of projects under active consideration for funding which exceeds one million two hundred fifty thousand dollars (\$1,250,000), except for Urgent Needs projects, ~~and, one Demonstration projects projects,~~ Capacity Building, and Scattered Site Housing. Applicants in the Community Revitalization category shall choose to apply for either a Concentrated Needs award, or an infrastructure award, or a scattered site award, Revitalization Strategy award.

(b) No local government may receive more than a total of one million two hundred fifty thousand dollars (\$1,250,000) in CDBG funds in the period that the state distributes its annual HUD allocation of CDBG funds; except that local governments may also receive up to six hundred thousand dollars (\$600,000) for a project that addresses Urgent Needs and funds for one demonstration project in addition to other grants awarded during the same time period.

(c) ~~Community Revitalization basic category~~ Concentrated Needs subcategory ~~and Infrastructure~~ applicants may spend a portion of their total grant amount to finance local option activities. Up to 15 percent may be spent on eligible activities which do not need to be directly related to proposed ~~projects projects, except in the Infrastructure subcategory. Alternatively,~~

~~up to 25 percent may be spent on eligible activities that contribute to comprehensive development of the main project area in a Concentrated Needs grant.~~ Job creation activities are not eligible local option activities ~~unless they are part of the 25 percent alternative.~~ Local option activities will not be competitively rated by the Division, but may be limited to specific eligible activities. Each local option project must show that:

- (1) At least fifty-one percent of the CDBG funds proposed for each activity will benefit low- and moderate-income persons, except that CDBG funds may be used for acquisition, disposition, or clearance of vacant units to address the national objective of prevention or elimination of slums or blight; and
- (2) CDBG funds proposed for each activity will address the national objective of benefiting low- and moderate-income persons, or aid in the prevention or elimination of slums or blight.

(d) The Division may review grant requests to determine the reasonableness and appropriateness of all proposed administrative and planning costs. Notwithstanding Rule .0910 of this Subchapter, grantees may not increase their approved planning and administrative budgets without prior Division approval. In no case, may applicants budget and expend more than 18 percent of the sum of funds requested and program income for administrative and planning activities for each project, except that demonstration funds may be awarded for projects limited to planning activities only in which case all funds will be spent for planning and administration.

(e) Applicants may spend CDBG funds in those areas in which the applicant has the legal authority to undertake project activities.

(f) Grants to specific recipients will be provided in amounts commensurate with the size of the applicant's program. In determining appropriate grant amounts for each applicant, the Division may consider an applicant's need, proposed activities, all proposed administrative and planning costs, and ability to carry out the proposed activities.

*Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.483; 42 U.S.C. 5301.*

**04 NCAC 19L .0407 GENERAL APPLICATION REQUIREMENTS**

(a) Local governments shall submit applications as prescribed by this Rule in order to be considered for funding. Selection of applications for funding will be based primarily on information contained in the application; thus applications must contain sufficient information for the Division to rate them against the selection criteria. In addition, the following may be considered: information from any source which regards the eligibility of the applicant or application; the legality or feasibility of proposed activities; the applicant's compliance with application procedures specified in this Subchapter or the accuracy of the information presented in the application; evaluation of proposed projects by on-site review; and category-specific information described in Sections .0500, .0700, .0800, .1200, .1300, and .1700 of this Subchapter. All applicants shall address their projects to one of the following grant categories: Community Revitalization (either

**PROPOSED RULES**

Concentrated Needs, ~~infrastructure or scattered site or Revitalization Strategies~~), Housing Development, Urgent Needs, Demonstration, ~~Scattered Site Housing or Community Empowerment Infrastructure, and Economic Development.~~

Applicants may apply in more than one grant category, providing the total grant application and award does not exceed the maximum limits described in Paragraphs (a) and (b) of Rule .0403 of this Section. Applicants shall submit an application that describes each project in sufficient detail to be adequately rated.

(b) Applications must be received by the Division's administrative offices in Raleigh before 5:00 p.m. on the submission date or sent by mail and postmarked on the submission date.

(c) Applicants must provide citizens with adequate opportunity for meaningful involvement in the development of Community Development Block Grant applications. Specific citizen participation guidelines are described further in Rule .1002 of this Subchapter. If the Division is aware of an applicant's failure to meet these citizen participation requirements, the Division may not rate the application.

(d) The Division may submit all CDBG applications and environmental review records as required by the National Environmental Policy Act and the State Environmental Policy Act to the State Clearinghouse of the Department of Administration for review and comments. The Division may require each applicant to submit a written description of how the applicant proposes to address each comment received from the State Clearinghouse.

(e) The applicant shall certify to the Division that it will comply with all applicable federal and state laws, regulations, rules and Executive Orders. Copies of these federal and state requirements are available for public inspection from the Division.

(f) Applicants must comply with the Housing and Community Development Act of 1974 as amended, all applicable federal and state laws, regulations, rules, and Executive Orders.

(g) Application requirements described in this Rule do not apply to demonstration grants and Urgent Needs grants, except for Paragraphs (a), (d), (f) and (g).

(h) For multi-family rental housing activities, the applicant must state in the application the standards it has adopted for determining affordable rents for such activities.

(i) Applicants that receive CDBG funding for projects may charge the cost of application preparation to prior CDBG programs or to the current program provided that procurement procedures consistent with 24 CFR 85.36 are followed. No more than three thousand five hundred dollars (\$3,500) may be charged to the CDBG program for application preparation.

~~(j) Applicants may apply for a Capacity Building grant in any category except in the Urgent Needs and Demonstration Projects categories .~~

*Authority G.S. 143B-10; 143B-431; 42 U.S.C.A. 5304(a); 24 C.F.R. 570.483.*

**SECTION .0500 – COMMUNITY REVITALIZATION PROJECTS**

**04 NCAC 19L .0501      DESCRIPTION**

(a) The Community Revitalization category includes activities in which a majority of funds is directed towards improving, preserving or developing residential areas. All eligible CDBG activities may be undertaken for the purpose of community revitalization. Applications for funding may involve single or multiple activities, addressing one or more needs in the area. ~~except for infrastructure and scattered site subcategories which addresses one need.~~ All Community Revitalization activities, ~~except for scattered site activities,~~ must be carried out within defined project areas. Community Revitalization funds shall be distributed to eligible units of local government on a competitive basis. Community Revitalization projects shall be evaluated against other Community Revitalization project proposals.

(b) The Community Revitalization category includes a subcategory for ~~scattered site housing activities which are directed towards one hundred per cent low and moderate income benefit or the prevention or elimination of slums or blight. Scattered site projects are limited to housing rehabilitation, acquisition, disposition, clearance, and relocation activities. Scattered site activities may be carried out in any location throughout the applicant's jurisdiction and need not be carried out in an area of concentrated need.~~

~~Up to 5 percent of the total project cost may be contributed from local or non-local funds in scattered site housing rehabilitation projects.~~

~~Scattered site funds shall be distributed to eligible units of local government on a competitive basis, and projects shall be evaluated against other scattered site project proposals.~~

~~Revitalization Strategies activities which provides funds to selected governments to address multiple need in high poverty areas. This new subcategory will provide funding to help carry out a long term revitalization strategy. Up to three hundred fifty thousand dollars (\$350,000) per year, will be awarded to eligible local government to carry out a strategy over three to five years. Revitalization Strategies funds can be used for any of the following components as part of strategies to address high poverty arrears in Tier 1/Tier 2 counties and non-entitlement municipalities with State Development Zones: housing, public services, economic development, public facilities, infrastructure. Activities must be targeted toward a defined geographical area that has at least 25% poverty and must involve collaboration with community/economic development organizations and partners.~~

(c) The Community Revitalization category includes a subcategory ~~for public infrastructure projects within a definable project area. Projects will be evaluated against other infrastructure project proposals. or concentrated needs activities which provides funds for improving, preserving, or developing residential neighborhoods. Concentrated Needs may not include more than one project. A project may have two sub-areas. Projects may have single or multiple activities except a project may not have only water and/or sewer activities. The maximum award amount for a Concentrated Needs application is seven hundred thousand dollars (\$700,000). The highest priority is given to housing needs, substandard housing, lack of water/sewer, and the second priority is given to neighborhood needs (streets and drainage). Concentrated needs funds can be used for rehabilitation, acquisition, clearance, relocation, disposition, water and wastewater, and streets and drainage.~~

*Authority G.S. 143B-10; 143B-431; 42 U.S.C.A. 5301;*

~~resources are not available to alleviate the urgent need.~~

**04 NCAC 19L .0502 ELIGIBILITY REQUIREMENTS**

(a) Applications for concentrated needs subcategory funds must show that:

- (1) At least 51 percent of the CDBG funds proposed for each project will benefit low- and moderate-income persons, except that CDBG funds proposed for local option activities may be used for acquisition, disposition, or clearance of vacant units to address the national objective of prevention or elimination of slums or blight; and
- (2) CDBG funds proposed for each activity will meet a national objective as specified in HUD regulations previously incorporated by reference, except that funds shall not be used to meet the national objective of urgent need which is covered by Rule .0801 of this Subchapter.

Applications that do not meet these eligibility requirements shall not be rated or funded. In designing projects which meet these requirements, applicants must ensure that activities do not benefit moderate-income persons to the exclusion of low-income persons.

(b) Applicants for ~~scattered-site~~ Revitalization Strategies subcategory funds must show that:

- (1) ~~Rehabilitation activities of occupied and vacant units must benefit 100 percent low and moderate income persons;~~ the defined area has at least 25% of poverty as determined in the most recent decennial census and defined in HUD CPD NOTICE 97-01, paragraph D, section 2, third bullet, as all of census tracts/block numbering areas in the area have at least a 25% poverty rate, and the area is primarily residential.
- (2) CDBG funds proposed for acquisition, clearance, and disposition of vacant units will address ~~the~~ a national objective. objective of preventing or eliminating slums or blight.

Authority G.S. 143B-10; 143B-431; 42 U.S.C.A. 5301; 24 C.F.R. 570.483.

**SECTION .0800 - URGENT NEEDS/CONTINGENCY PROJECTS**

**04 NCAC 19L .0802 ELIGIBILITY REQUIREMENTS**

Urgent Needs grant applicants must ~~certify to meet~~ all ~~three-four~~ of the following eligibility requirements:

- (1) the need addressed by the application must have arisen during the preceding 18-month period and represent an imminent threat to public health or safety;
- (2) the need addressed by the application must represent a unique and unusual circumstance that does not occur frequently in a number of communities in the state;
- (3) the applicant does not have sufficient local ~~resources; and resources, and state or federal~~

~~(4) other financial resources are not available to alleviate the urgent need.~~

Authority G.S. 143B-10; 143B-431; 42 U.S.C.A. 5304(b)(3); 24 C.F.R. 570.483.

**SECTION .0900 – GRANT ADMINISTRATION**

**04 NCAC 19L .0901 GRANT AGREEMENT**

(a) Upon approval of the application by the Division, a written grant agreement shall be executed between the recipient and the Division. These Rules, the approved application, guidelines, and any subsequent amendments to the approved application shall become a part of the grant agreement.

(b) The grant agreement in its original form and all modifications thereto shall be kept on file in the office of the recipient in accordance with Rule .0911 of this Section.

(c) The Division may condition the grant agreement until the recipient demonstrates compliance with all applicable laws and regulations. In the case of Housing Development and ~~Community Empowerment~~ Revitalization Strategies projects the grant agreement may be conditioned until legally binding commitments have been obtained from all participating entities.

(d) Neither CDBG nor non-CDBG funds involved in a project may be obligated, nor may any conditioned project activities begin until the Division releases in writing any and all applicable conditions on the project. Recipients may incur costs prior to release of conditions with prior Division approval in accordance with Rule .0908 of this Section.

Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.483.

**04 NCAC 19L .0911 RECORDKEEPING**

(a) The Secretary of the Department of Commerce, the Secretary of the Department of Housing and Urban Development, or any of their duly authorized representatives shall have access to all books, accounts, records, reports, files, and other papers or property of recipients or their subgrantees and contractors pertaining to funds provided under this Subchapter for the purpose of making surveys, audits, examinations, excerpts and transcripts.

(b) All Community Development Program records that are public under G.S. 132 shall be made accessible to interested individuals and groups during normal working hours, and shall be maintained at all times at the recipient's local government office.

(c) Financial records, supporting documents and all other reports and records required under this Subchapter, and all other records pertinent to the Community Development Program shall be retained by the recipient for a period of ~~three-five~~ years from the date of the closeout of the program, except as follows:

- (1) Records that are the subject of audit findings shall be retained for ~~three-five~~ years or until such audit findings have been resolved, whichever is later;
- (2) Records for nonexpendable property which was acquired with Federal grant funds shall be retained for ~~three-five~~ years after its final disposition;

- (3) Records for any displaced person shall be retained for ~~three-five~~ years after he/she has received final payment;
  - (4) Records pertaining to each real property acquisition shall be retained for ~~three-five~~ years after settlement of the acquisition, or until disposition of the applicable relocation records in accordance with Subparagraph (3) of this Section, whichever is later; and
  - (5) If a litigation, claim or audit is started before the expiration of the ~~three-five~~-year period, the records shall be retained until all litigations, claims, or audit findings involving the records have been resolved.
- (d) All records shall be sufficient to determine compliance with the requirements and primary objectives of the Community Development Block Grant Program and all other applicable laws and regulations. All accounting records shall be supported by source documentation and shall be in compliance with Rule .0906 of this Section.

*Authority G.S. 143B-10; 143B-431; 42 U.S.C.A. 5304(d)(2),(e); 24 C.F.R. 570.490.*

**04 NCAC 19L .0912      AUDIT**

- (a) The recipient's financial management systems shall provide for audits to be made by the recipient or at the recipient's direction, in accordance with the following:
- (1) The recipient shall provide for an audit of its CDBG program on an annual basis for any fiscal year in which twenty-five thousand (\$25,000) or more in CDBG funds are received in accordance with the annual independent audit procedures set forth in G.S. 159-34;
  - (2) The CDBG program audit shall be performed in conjunction with the regular annual independent audit of the recipient and shall contain an examination of all financial aspects of the CDBG program as well as a review of the procedures and documentation supporting the recipient's compliance with applicable statutes and regulations;
  - (3) CDBG program funds may only be used to pay for the CDBG portion of the audit ~~costs;~~ costs if more than three hundred thousand dollars (\$300,000) in all Federal Programs are used;
  - (4) The recipient shall submit the Annual Audit Report to the Division, including the information identified in Paragraph (b) of this Rule, along with an Annual Performance Report as required by Rule .1101 of this Subchapter; and
  - (5) The Division may require separate closeout audits to be prepared by the recipient in accordance with Paragraph .0913 (e) of this Section.
- (b) Audits shall comply with the requirements set forth in this Paragraph:
- (1) Audits will include, at a minimum, an examination of the systems of internal control,

- (2) systems established to insure compliance with laws and regulations affecting the expenditure of grant funds, financial transactions and accounts, and financial statements and reports of recipient organizations;
- (2) Financial statements shall include footnotes, comments which identify the statements examined, the period covered, identification of the various programs under which the recipient received CDBG funds, and the amount of the awards received;
- (3) Audits shall be made in accordance with the GENERAL ACCOUNTING OFFICE STANDARDS FOR AUDIT OF GOVERNMENTAL ORGANIZATIONS, PROGRAMS, ACTIVITIES AND FUNCTIONS, THE GUIDELINES FOR FINANCIAL AND COMPLIANCE AUDITS OF FEDERALLY ASSISTED PROGRAMS, any compliance supplements approved by the Federal Office of Management and Budget (OMB), and generally accepted auditing standards established by the American Institute of Certified Public Accountants;
- (4) The audit shall include the auditor's opinion as to whether the financial statements are fairly presented in accordance with generally accepted accounting principles. If an unqualified opinion cannot be expressed, state the nature of the qualification;
- (5) The auditors' comments on compliance and internal control shall:
  - (A) Include comments on weaknesses in and noncompliance with the systems of internal control, separately identifying material weaknesses;
  - (B) Identify the nature and impact of any noted instances of noncompliance with the terms of agreements and those provisions of State or Federal laws and regulations that could have a material effect on the financial statements and reports;
  - (C) Contain an expression of positive assurance with respect to compliance with requirements for tested items and negative assurance for untested items;
  - (D) Comment on the accuracy and completeness of financial reports and claims for advances or reimbursement to Federal agencies;
  - (E) Comment on corrective action taken or planned by the recipient;
- (6) Work papers and reports shall be retained for a minimum of ~~three-five~~ years from the date of the audit report unless the auditor is notified in writing by the Division of the need to extend the retention period. The audit work papers shall be made available upon request to the

Division and the General Accounting Office or its designees;

42 U.S.C.A. 5304(d)(2),(e); 24 C.F.R. 44.6; 24 C.F.R. 85.36(e); 24 C.F.R. 570.492.

- (7) If during the course of the audit, the auditor becomes aware of irregularities in the recipient organization the auditor shall promptly notify the Division and recipient management officials about the level of involvement. Irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriation of funds or other assets;

- (8) Selection of an independent auditor shall be in accordance with Rule .0908 of this Section.

(c) A "single audit," in which the regular independent auditor will perform an audit of all compliance aspects for all federal grants along with the regular financial audit of the recipient, is permissible. Where feasible, the recipient shall use the same auditor so that the audit will include the financial and compliance work under a single plan in the most economical manner.

(d) Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts awarded with CDBG funds. Recipients shall take the following affirmative action to further this goal:

- (1) Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals as defined in P.L. 95-507 are used to the fullest extent practicable;
- (2) Make information on forthcoming opportunities available, and arrange time frames for the audit so as to encourage and facilitate participation by small or disadvantaged firms;
- (3) Consider in the contract process whether firms competing for larger audits intend to subcontract with small or disadvantaged firms;
- (4) Encourage contracting with small or disadvantaged audit firms which have traditionally audited government programs, and in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities;
- (5) Encourage contracting with consortiums of small or disadvantaged audit firms when a contract is too large for an individual small or disadvantaged audit firm; and
- (6) Use the services and assistance, as appropriate, of the Small Business Administration, and the Minority Business Development Agency of the U.S. Department of Commerce in the solicitation and utilization of small or disadvantaged audit firms.

(e) All records, data, audit reports and files shall be maintained in accordance with Rule .0909 of this Section, unless otherwise stated in this Rule.

(f) The provisions of this Rule do not limit the authority of the Department to make audits of recipients' organizations.

**SECTION .1000 – COMPLIANCE REQUIREMENTS**

**04 NCAC 19L .1002 CITIZEN PARTICIPATION**

(a) Each applicant and recipient shall provide citizens with an adequate opportunity for meaningful involvement on a continuing basis and for participation in the planning, implementation and assessment of the program. Each applicant and recipient shall provide adequate information to citizens, hold public hearings, provide for timely responses to citizens' complaints, and certify that it is following a detailed Citizen Participation Plan as in Paragraphs (b) through (h) of this Rule. All public hearings shall be held by the governing board of the applicant or recipient.

(b) Citizen participation in the application process.

(1) Each applicant for CDBG funds shall:

(A) Solicit and respond in a timely manner to views and proposals of citizens, particularly low- and moderate-income persons, members of minority groups, and residents of blighted areas where activities are proposed. Applicants shall respond in writing to written citizen comments. Responses shall be made within ten calendar days of receipt of the citizen ~~comment~~Comment, when practicable.

(B) Provide technical assistance to facilitate citizen participation, where requested. The technical assistance shall be provided to groups representative of persons of low- and moderate-income that request such assistance in developing proposals. The level and type shall be determined by the applicant.

(C) Provide adequate notices of public hearings in a timely manner to all citizens and in such a way as to make them understandable to non-English speaking persons. Hearings must be held at times and locations convenient to potential or actual beneficiaries and with accommodations for the handicapped. A notice of the public hearing shall be published at least once in the nonlegal section of a newspaper having general circulation in the area. The notice shall be published not less than ten days nor more than 25 days before the date fixed for the hearing. The notice of public hearing to obtain citizens' views after the application has been prepared, but prior to the submission of the application to the Division, shall contain a description of the proposed project(s) including

Authority G.S. 143B-10; 143B-431; 159-34;

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- the proposed project location, activities to be carried out, and the total costs of activities. The notice of the public hearing should also contain the language for submitting objections contained in the Part (b)(2)(A) of this Rule.
- (D) Schedule hearings to obtain citizens' views and to respond to citizen proposals at times and locations which permit broad participation, particularly by low- and moderate-income persons, members of minority groups, handicapped persons, and residents of blighted neighborhoods and project areas.
  - (E) Conduct one public hearing during the planning process to allow citizens the opportunity to express views and proposals prior to formulation of the application, except that applicants in the Urgent Needs category are exempt from holding this public hearing.
  - (F) Conduct one public hearing after the application has been prepared but prior to submission of the application to the Division.
- (2) Submitting objections to the Division.
- (A) Persons wishing to object to the approval of an application by the Division shall submit to the Division their objections in writing. The Division shall consider objections made only on the following grounds:
    - (i) The applicant's description of the needs and objectives is plainly inconsistent with available facts and data,
    - (ii) The activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant, and
    - (iii) The application does not comply with the requirements of this Subchapter or other applicable laws.
  - (B) All objections shall include an identification of the requirements not met. In the case of objections made on the grounds that the description of needs and objectives is plainly inconsistent with significant, generally available facts and data, the objection shall include the facts and data upon which the objection is based.
- (c) Citizen Participation Plan. Recipients shall develop and adopt, by resolution of their governing board, a written citizen participation plan developed in accordance with all provisions of this Rule and which:
- (1) provides for and encourages citizen participation with particular emphasis on participation by persons of low- and moderate-income who are residents of slum and blight areas and of areas in which CDBG funds are proposed to be used;
  - (2) provides citizens with reasonable and timely access to local meetings, information, and records relating to the recipient's proposed and actual use of funds;
  - (3) provides for technical assistance to groups representative of persons of low- and moderate-income that request such assistance in accordance with Part (b)(1)(B) of this Rule;
  - (4) provides for public hearings to obtain citizen views and to respond to proposals and questions at all stages of the community development program in accordance with Paragraphs (b), (f), and (g) of this Rule;
  - (5) provides a procedure for developing timely written responses to written complaints and grievances within ten calendar days of receipt of the complaint. The procedure shall include all provisions of Paragraph (d) of this Rule; and
  - (6) identifies how the needs of non-English speaking residents will be met in the case of public hearings where a significant number of non-English speaking residents can be reasonably expected to participate.
- (d) The recipient shall develop and adopt a written complaint procedure to respond to citizen complaints involving the CDBG program. The complaint procedure shall be applicable through the life of the grant and available to the general public. It shall specify that the recipient will respond in writing to written citizen complaints within ten calendar days of receipt of the complaint. The procedure shall include a phone number for further information or clarification on the complaint procedure and shall identify any local procedures or appeals process that would normally be used by the recipient to address citizen complaints. The complaint procedure shall also state that if a citizen lodging a complaint is dissatisfied with the local response, then that person may direct the complaint to the North Carolina Division of Community Assistance.
- (e) Citizen participation during program implementation. Citizens shall have the opportunity to comment on the implementation of a Community Development Program throughout the term of the program. Recipients shall solicit and respond to the views and proposals of citizens in the same manner as in Part (b)(1)(A) of this Rule.
- (f) Citizen participation in the program amendment process.
- (1) Recipient procedures.
    - (A) Recipients proposing amendments which require prior Division approval in accordance with Rule .0910 of this Subchapter shall to conduct one public hearing prior to submission of

the amendment to the Division in the same manner as in Part (b)(1)(C) of this Rule.

(B) Each recipient shall respond to citizen objections and comments in the same manner as in Part (b)(1)(A) of this Rule.

(2) Submitting Objections to the Division.

(A) Persons wishing to object to the approval of an amendment by the Division shall make such objection in writing. The Division shall consider objections made only on the following grounds:

(i) The recipient's description of needs and objectives is plainly inconsistent with available facts and data,

(ii) The activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the recipient, and

(iii) The amendment does not comply with the requirements of this Section or other applicable laws and regulations.

(B) All objections shall include an identification of the requirements not met. In the case of objections made on the grounds that the description of needs and objectives is plainly inconsistent with significant, generally available facts and data, the objection shall include the facts and data upon which the objection is based.

(g) Citizen participation in the program closeout process.

(1) Recipients shall conduct one public hearing to assess program performance during the grant closeout process and prior to the actual closeout of the grant in the same manner as in Part (b)(1)(C) of this Rule.

(2) Recipients shall continue to solicit and respond to citizen comment in the same manner as in Part (b)(1)(A) of this Rule until such time as the grant program is closed.

(h) Persons may submit written comments to the Division at any time concerning the applicant's or recipient's failure to comply with the requirements contained in this Subchapter.

(i) All records of public hearings, citizens' comments, responses to comments and other relevant documents and papers shall be kept in accordance with Rule .0911 of this Subchapter. All program records shall be accessible to citizens in accordance with Rule .0911(b) of this Subchapter.

Authority G.S. 143B-10; 143B-431; 42 U.S.C.A. 5304(a)(2); 24 C.F.R. 570.486.

**SECTION .1700 – SCATTERED SITE HOUSING CATEGORY**

**04 NCAC 19L .1701 DESCRIPTION**

Grants under the ~~Community Empowerment Scattered Site Housing~~ Category ~~shall improve self sufficiency and economic opportunities~~ directs activities toward one hundred percent low- and moderate-income persons. ~~Scattered Site Housing projects are limited to housing rehabilitation, acquisition, disposition, clearance, and relocation activities. Scattered Site Housing activities may be carried out in any location throughout the recipient's jurisdiction. Scattered Site Housing funds shall be distributed to eligible units of local governments in a three year rotating basis and periodically based on distribution plans and prior performance.~~

Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.483.

**04 NCAC 19L .1702 ELIGIBILITY REQUIREMENTS**

(a) Applications for ~~Community Empowerment Scattered Site Housing~~ funds must show that:

(1) ~~At least 51-100~~ percent of the CDBG funds proposed for each project will benefit low- and moderate-income persons; and

(2) CDBG funds proposed for each activity shall meet a national objective as specified in HUD regulations previously incorporated by reference, except that funds shall not be used to meet the national objective of urgent need which is covered by Rule .0801 of this Subchapter.

~~(3) The project includes at least one dollar (\$1.00) of non-CDBG funds to match each dollar of CDBG funds requested, except for projects in counties designated by the Secretary of Commerce as Tier One Enterprise Areas as defined in G.S. 105-130.40(e) or areas designated by the federal government as Enterprise Zones.~~

(b) ~~Applicants shall have the capacity of administer a CDBG program.~~The Division may examine the following areas to determine capacity:

(1) audit and monitoring findings on previously funded Community Development Block Grant programs, and the applicant's fiscal accountability as demonstrated in other state or federal programs or local government financial reports; and

(2) the rate of expenditure of funds and accomplishments in previously funded CDBG programs.

Applicants that show a lack of capacity will not be rated or funded.

Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.482; 24 C.F.R. 570.483.

**04 NCAC 19L .1703 SELECTION CRITERIA**

~~Localities that have Community Empowerment grants that are open may not apply for additional funds under this category until the grant is closed. In addition, local governments may have~~

~~only one Community Empowerment application under review at one time.~~ Criteria for awards are:

- (1) community need;
- (2) community impact;
- (3) project design;
- (4) financial feasibility;
- ~~(5) year of eligibility;~~
- ~~(6) distribution plan; and~~
- ~~(7) participation process.~~

Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.489.

**SECTION .2000 - INFRASTRUCTURE**

**04 NCAC 19L .2001 DESCRIPTION**

~~(a) The infrastructure category includes activities in which funds are directed toward improving existing infrastructure or providing new infrastructure to existing neighborhoods with serious environmental or health problems;~~

~~(b) Providing public infrastructure to low-and moderate- income persons.~~

Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.489.

**04 NCAC 19L .2002 ELIGIBILITY REQUIREMENTS**

~~(a) The only eligible activities in infrastructure are related to public water and public wastewater (sewer) to benefit homes in residential neighborhoods. Street repairs only to the extent necessary to repair surfaces dug up in laying pipe may be included in the public water sewer budget line items. Infrastructure may not include more than one project. Projects may carry out either public water or public wastewater (sewer) activities or both.~~

~~(b) Applicants must insure that each Infrastructure activity benefits at least 51% low and moderate income persons. Additionally, applicants must ensure that activities do not benefit moderate income persons to the exclusion of low income persons, and that all funds are spent in support of a national objective.~~

Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.489.

**04 NCAC 19L .2003 SELECTION CRITERIA**

Criteria for awards are:

- (1) severity of needs;
- (2) benefit to low and moderate income persons;
- (3) local commitment;
- (4) treatment of needs; and
- (5) appropriateness and feasibility.

Authority G.S. 143B-10; 143B-431; 24 C.F.R. 570.489.

**TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to adopt the rules cited as 10 NCAC 41H .0409-.0410. Notice of Rule-making Proceedings was published in the Register on January 2, 2001.

**Proposed Effective Date:** July 17, 2002

**Public Hearing:**

**Date:** December 5, 2001

**Time:** 10:00 a.m.

**Location:** 325 N. Salisbury Street, Albemarle Building, Room 832, Raleigh, NC 27603

**Reason for Proposed Action:** In the 2000 Legislative Session, the General Assembly established the Special Children Adoption Incentive Fund to provide financial incentives for foster families desiring to adopt special needs children residing in their care. The establishment of this Fund will make it possible for some of the children with special needs to be adopted who would otherwise remain in the foster care system because of the financial loss to foster parents. Counties who participate in the Special Children Adoption Incentive Fund must commit to provide 50% of the cost of this incentive to the foster parent(s) who choose to adopt a special needs child.

The fact that a child has special needs should not preclude the child from the benefits of a permanent loving home. The removal of the financial disincentive to foster parent(s) who wish to adopt will remove another barrier for children who need loving, adoptive parent(s).

**Comment Procedures:** Anyone wishing to comment should contact Sharnese Ransom, APA Coordinator, Social Services Commission, NC Division of Social Services, 325 N. Salisbury Street, 2401 Mail Service Center, Raleigh, NC 27699-2401, phone 919/733-3055. Verbal comments will be heard during the public hearing. Written comments must be received by Ms. Ransome no later than December 5, 2001 at 9:00 a.m.

**Fiscal Impact**

- State
- Local
- Substantive (≥\$5,000,000)
- None

**CHAPTER 41 – CHILDREN'S SERVICES**

**SUBCHAPTER 41H – ADOPTION STANDARDS**

**SECTION .0400 – ADOPTION ASSISTANCE: GENERAL**

**10 NCAC 41H .0409 ELIGIBILITY REQUIREMENTS FOR THE SPECIAL CHILDREN ADOPTION INCENTIVE FUND AND EFFECTIVE DATE**

~~(a) Within the limits of available funding, the following criteria shall establish eligibility for the Special Children Adoption Incentive Fund. Eligibility is verified and approved on a case-by-case basis by staff of the Division of Social Services for compliance with budgetary limitations and all of the following eligibility criteria:~~

- ~~(1) The child must be in the custody and placement responsibility of the participating county departments of social services;~~
- ~~(2) The child has been in the legal custody of a participating county department of social services for at least six consecutive months and has a health condition (physical, mental,~~

etc.) that is expected to result in impairment in the child's ability to function in the home, school or community and to endure throughout childhood. The child's health condition and the duration of the condition shall be documented by a written statement from a licensed physician and maintained in the child's record;

- (3) The child requires eight or more hours daily of direct supervision for personal health care or prevention of self-destructive or assaultive behavior. The status of the child's condition and the supervision needed for the child's condition shall be documented in a written statement from a licensed health or mental health practitioner. The county department of social services working with the foster family and child shall document knowledge of the child's condition and the need for eight or more hours of daily direct supervision by the foster family, health professional or special education teacher;
- (4) The foster parent(s) are licensed and the child has resided in the home for the previous six months on a continuous basis. The child's length of stay shall be documented in a written statement from the county department of social services. A copy of the foster home license shall be maintained in the child's record;
- (5) The foster parent(s) have been receiving monthly cash assistance from any governmental source whether federal, State or local above the state adoption assistance rate established by the General Assembly for the previous six months on a continuous basis to provide the care required for the child's health condition and functional impairment;
- (6) The foster parent(s) are willing to adopt the child only if the monthly cash assistance from any governmental source whether federal, State or local above the state adoption assistance rate received as foster parent(s) is not terminated;
- (7) The foster parent(s) have signed an adoption assistance agreement and a supplemental agreement that includes the additional amount of cash assistance that the foster parent(s) have agreed to accept prior to the finalization of the adoption;
- (8) The Decree of Adoption for the child was issued by the court on or after January 1, 2001; and
- (9) The county department of social services having legal custody of the child voluntarily agrees to participate in the Special Children Adoption Incentive Fund and agrees to assume 50% of the payment above the State adoption assistance rate established by the General Assembly.

(b) The Special Children Adoption Incentive Fund benefits for which the child may be eligible will become effective the first

month following the month in which the Decree of Adoption is issued.

*Authority G.S. 108A-49; 108A-50; 143B-153; S.L. 2000-67, Sec. 11.16.*

**10 NCAC 41H .0410 PAYMENTS FROM THE SPECIAL CHILDREN ADOPTION INCENTIVE FUND**

(a) Payments from the Special Children Adoption Incentive Fund will be made by the Division of Social Services to the adoptive parent(s).

(b) Participating county departments of social services shall submit claims for payments to the Division of Social Services.

(c) The initial payment claim must include the following items:

- (1) verification of child's placement authority;
- (2) verification that the child has lived with the foster family six consecutive months;
- (3) copy of written statement from a licensed physician regarding the child's health condition;
- (4) copy of written statement from a licensed health, mental health, or developmental disability professional regarding the status of the child's condition;
- (5) copy of signed adoption assistance agreement;
- (6) copy of signed supplemental assistance agreement; and
- (7) copy of Decree of Adoption.

(d) Monthly payment claims shall be submitted on the "Request for Special Children Adoption Incentive Fund Payment" form developed by the Division of Social Services.

*Authority G.S. 108A-49; 108A-50; 143B-153; S.L. 2000-67, Sec. 11.16.*

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Soil and Water Conservation Commission intends to amend the rule cited as 15A NCAC 06E .0103. Notice of Rule-making Proceedings was published in the Register on April 16, 2001.*

**Proposed Effective Date:** August 1, 2002

**Instructions on How to Demand a Public Hearing:** *(must be requested in writing within 15 days of notice): Any person requesting that the Soil and Water Conservation Commission conduct a public hearing on any portion of this proposed rule must submit a written request to Vernon Cox, Division of Soil and Water Conservation, 1614 Mail Service Center, Raleigh, NC 27699-1614 by September 20, 2001. The request must specify which rule the hearing is being requested on. Mailed written requests must be postmarked no later than September 20, 2001.*

**Reason for Proposed Action:** *The Soil and Water Commission's Cost Share Committee reviewed the existing formula for allocating Agriculture Cost Share Program funds to Soil and Water Conservation Districts and recommended a modification to help ensure that the funds are allocated*

*equitably on the basis of water quality needs and District capabilities.*

**Comment Procedures:** *All persons interested in these proposed amendments are encouraged to submit written comments. Comments must be postmarked by October 4, 2001 and submitted to Vernon Cox, Division of Soil and Water Conservation, 1614 Mail Service Center, Raleigh, NC 27699-1614.*

**Fiscal Impact**

- State
- Local
- Substantive (≥\$5,000,000)
- None

**CHAPTER 06 – SOIL AND WATER CONSERVATION COMMISSION**

**SUBCHAPTER 06E - AGRICULTURE COST SHARE PROGRAM FOR NONPOINT SOURCE POLLUTION CONTROL**

**SECTION .0100 – AGRICULTURE COST SHARE PROGRAM**

**15A NCAC 06E .0103 ALLOCATION GUIDELINES AND PROCEDURES**

- (1) 
$$\frac{\text{Sum of Parameter Points}}{\text{Points}} + \frac{\text{District Technical Assistance Points}}{\text{Points}} = \text{Total Points}$$
- (2) 
$$\begin{matrix} \text{Percentage Total} & & \text{Total} & & \text{Dollars Available} \\ \text{Points Each} & \times & \text{Dollars} & = & \text{to} \\ \text{District} & & \text{Available} & & \text{Each District} \end{matrix}$$
- (3) Because of other program restraints or increased demands for funds a district may request fewer (Group A) or more (Group B) dollars than are available.  
Thus,  

Dollars Available Per District, (2)	-	Dollars Requested by the District	=	Difference
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  - (A) Group A Districts request less than amount (2).
  - (B) Group B Districts request more than amount (2).
- (4) The dollars in excess of Group A District requests are apportioned to Group B Districts in the following manner:  

Total of Those Funds in Excess of that Requested by Group A Districts	x	Percentage of Total Excess Requests by each Group B District Request	=	Amount Added to Group B
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- (5) Therefore, there are two categories of districts in the allocation method:
  - (A) Those receiving 100 percent of request (Group A).
  - (B) Those receiving less than 100 percent of requests (Group B) who receive amounts (2) plus (4).

(a) The commission will allocate the cost share funds to the districts in the designated program areas. To receive fund allocations, each district designated eligible by the commission is required to submit an annual strategy plan to the commission at the beginning of each fiscal year. Funds may be allocated to each district for any or all of the following purposes: cost share payments, cost share incentive payments, technical assistance, or administrative assistance. Use of funds for technical and administrative assistance must follow the guidelines set forth in Rule .0106 of this Subchapter.

(b) Funds will be allocated to the districts at the beginning of the fiscal year. Districts will be allocated monies based on the identified level of agricultural related nonpoint source pollution problems and the respective district's BMP installation goals and available technical services as demonstrated in the district annual strategy plan. The allocation method used for disbursement of funds is based on the relative position of each respective district for those parameters established by the Division and approved by the commission. These parameters are designed to reflect the agricultural nonpoint source problems, the conservation needs, and the technical assistance available in the area of the state included in the current program year funding. Each district is assigned points for its relative position for each ~~parameter, parameter and also for technical assistance hired under the 50:50 cost share (Rule .0106 of this Subchapter)~~ and the points are totaled and proportioned to the total dollars available under the current program year funding.

- (c) 95 percent of the total program funding will be allotted to the district accounts in the initial allocation. The Division will retain five percent of the total funding in a contingency fund to be allocated at a later date as determined by the commission.
- (d) Cost share funds allocated to a district during a fiscal year that have not been encumbered to an agreement by the third Wednesday of February of that fiscal year will be subject to recall by the commission.
- (e) Districts with unencumbered funds as of the third Wednesday of February of the current fiscal year may request, in

- writing to the commission, to retain those funds. Requests must be received by the Division no later than 9:30 a.m. on the first Wednesday of March of the current fiscal year.
- (f) Districts may apply for additional funds to the commission by written application to be received by the Division no later than 9:30 a.m. on the first Wednesday in March.
- (g) The amount of recalled funds shall be divided among the eligible districts applying for reallocation based on projected needs as outlined in the written applications received by the commission as stated in Rule .0103(e) of this Subchapter. The

**PROPOSED RULES**

Division will notify the commission by the third Wednesday in March of the current balance of funding and the district's requests to retain present allocation and to obtain new funds. The commission shall decide the amount of funds reallocated to each district and the districts will be notified of their final allocation by the fourth Wednesday of March.  
(h) CPO's that encumber funds under the current year must be submitted to the Division by 9:30 a.m. on the first Wednesday in June.

*Authority G.S. 139-4; 139-8; 143-215.74; 143B-294.*

**TITLE 19A – DEPARTMENT OF TRANSPORTATION**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Transportation – Division of Highways intends to amend the rule cited as 19A NCAC 02B .0165. Notice of Rule-making Proceedings was published in the Register on July 2, 2001.*

**Proposed Effective Date:** August 1, 2002

**Public Hearing:**

**Date:** October 23, 2001

**Time:** 2:00 p.m.

**Location:** Transportation Building, Room 150, 1 S. Wilmington Street, Raleigh, NC 27601

**Reason for Proposed Action:** *This Rule is proposed for amendment to increase the dollar amount of a yearly asbestos abatement contract from two hundred fifty thousand dollars (\$250,000) to one million dollars (\$1,000,000) due to increased cost for the work.*

**Comment Procedures:** *Any interested person may submit written comments on the proposed rule by mailing the comments to Emily Lee, NC DOT, 1501 Mail Service Center, Raleigh, NC 27699-1501 by November 21, 2001.*

**Fiscal Impact**

- State
- Local
- Substantive (≥\$5,000,000)
- None

**CHAPTER 02 – DIVISION OF HIGHWAYS**

**SUBCHAPTER 02B – HIGHWAY PLANNING**

**SECTION .0100 – RIGHT OF WAY**

**19A NCAC 02B .0165 ASBESTOS CONTRACTS WITH PRIVATE FIRMS**

(a) The North Carolina Department of Transportation maintains a staff capable of performing the normal workload for most of the functions required for the acquisition of rights of way for our highway systems. However, it is recognized that situations arise and certain specific needs exist which can best be met by the use of qualified consultants outside the Department. These Rules are established for the preparation, execution and administration

of contracts over ten thousand dollars (\$10,000.00) for Asbestos Inspections, Asbestos Removals, and Structure Clearings by consultant firms.

(b) The following are incorporated by reference including any subsequent amendments or editions:

- (1) General Statute 136-28.1(f) and General Statute 130A-444 thru General Statute 130A-451.
- (2) 23 CFR 710-720, FHWA right of way regulations which contain some contracting requirements.
- (3) 49 CFR 18.36, USDOT contracting regulations. These documents are available for public inspection in the office of the Right of Way Branch. Copies may be obtained from the Contract Administrator at a cost of five dollars (\$5.00) for each document.

(c) Contracts on Specific Projects.

- (1) The Department may continue to let individual contracts on specific projects for inspections, abatements or structure clearings to a responsible bidder after publicly advertising for bids.
- (2) If the Manager of the Right of Way Branch determines that the project schedule does not allow time for public advertising the Department shall solicit at least three informal bids and may award a contract to the lowest responding qualified bidder.

(d) Retainer Contracts. In order to provide a method of accomplishing the required asbestos inspections, asbestos abatements, and structure clearings when the Right of Way Branch Manager determines that the project schedule does not provide enough time for a specific project contract to be put in place by the procedure in Subparagraphs (c)(1) and (c)(2) of this Rule, the Department may also contract with private firms as specified in Paragraphs (d) through (u) of this Rule.

(e) Due to the diversity of contract types, some portions of these Rules may not be fully applicable to all situations. The Right of Way Branch Manager shall be responsible for determining when waivers from portions of these Rules are justified. Guidelines for determining if a waiver is justified shall include:

- (1) The amount of time the Department has to secure bids for a specific project under Subparagraphs (c)(1) and (c)(2) of this Rule.
- (2) The willingness of contractors retained under this Rule to perform work on a specific project. Any waiver from these Rules will require approval of FHWA if Federal Funds are involved in the project.

(f) DEFINITIONS. The following definitions are for the purpose of clarifying and describing words and terms used herein:

- (1) Contract Administrator - The individual who is assigned the responsibility of initiating, negotiating, and administering the contracts for Asbestos Inspections, Asbestos Removals and Structure Clearings.
- (2) Cost per Unit of Work - A method of compensation based on an agreed cost per unit

- (3) of work including actual costs, overhead, payroll additives and operating margin. Cost Plus Fixed Fee - A price on the actual allowable cost, including overhead and payroll additives, incurred by the firm performing the work plus a pre-established fixed amount for operating margin.
- (4) Cost Proposal - A detailed submittal specifying the amount of work anticipated and compensation requested for the performance of the specific work or services as defined by the Department.
- (5) Firm - Any private agency, firm, organization, business or individual offering qualified Asbestos Inspections, Asbestos Removals and Structure Clearings.
- (6) Lump Sum - A fixed price, including cost, overhead, payroll additives and operating margin for the performance of specific work or services.
- (7) Payroll Burden - Employer paid fringe benefits including employers portion of F.I.C.A., comprehensive health insurance, group life insurance, unemployment contributions to the State, vacation, sick leave, holidays, workers compensation and other such benefits.
- (8) Proposal - An offer by a firm to perform specific work or services for the Department at specified rates of compensation.
- (9) Scope of Work - All services, actions and physical work required by the Department to achieve the purpose and objectives defined in the contract. Such services may include the furnishing of all required labor, equipment, supplies and materials except as specifically stated.
- (10) Contract Amendment - A written supplement to the contract which modifies the terms of an existing contract.
- (11) Termination Clause - A contract provision which allows the Department to terminate, at its discretion, the performance of work, in whole or in part, and to make final payment in accordance with the terms of the contract.

(g) APPLICATION. These Rules shall apply to all Retainer contracts for Asbestos Inspections, Asbestos Removals, and Structure Clearings obtained by the Right of Way Branch of the Department of Transportation under the authority of G.S. 136-28.1(f) and in accordance with the provisions of G.S. 130A-444 through 130A-451.

(h) SELECTION COMMITTEE. The Committee shall consist of the Right of Way Branch Manager or his designated Representative, the State Relocation Agent and Property Manager or his designated Representative, and at least one employee of the Department's Preconstruction Unit or Construction Unit Professional Staff designated by the Right of Way Branch Manager, and shall be chaired by the Right of Way Branch Manager or his Representative.

(i) SELECTION OF FIRMS. On a yearly basis (or more often if needed), the Department shall advertise for firms interested in performing Asbestos Inspections, Asbestos Removals, and

Structure Clearings for the North Carolina Department of Transportation. The advertisement will be published in the North Carolina Purchase Directory. The response time will normally be two weeks after the advertising date. The response shall include copies of the numbered certifications of employees certified by NC Department of Environment, Health, and Natural Resources - Occupational Health Section Asbestos Program to perform Asbestos Inspections, copies of the firms latest brochures, and such similar information related to the firms qualifications. Evaluation of the firms expressing interest will be based on the following considerations:

- (1) Experience, education, reputation, and required certifications of staff in the fields of expertise required by the contract including inspection, abatement, and structure clearings;
- (2) Number of staff available to perform the services required by the contract including inspection, abatement, and structure clearings;
- (3) Financial ability to undertake the proposed work;
- (4) The firm's accounting system including ability to identify costs chargeable to the project;
- (5) Past performance by the firm on previous Right of Way acquisition contracts including meeting the time schedule for the work;
- (6) Equipment necessary to perform the required services. The Selection Committee shall, on the basis of the criteria of Subparagraphs (1) - (6) of this Paragraph, select a sufficient number of firms for contract negotiations in order that those negotiations will produce a sufficient number of contracts to handle the anticipated work over the next year. The number of firms shall be determined prior to advertising.

(j) REQUEST FOR PROPOSALS. Each Selected Firm and Alternate will be requested by the Contract Administrator to submit a Proposal which provides for:

- (1) Unit Cost for inspection and lab analysis, if any;
  - (A) per unit of less than 800 SF (minimum of 4 samples - to include out buildings, signs, barns, etc.);
  - (B) per unit of 800 SF to 2000 SF (maximum of 8 samples);
  - (C) per unit of 2000 SF to 5000 SF (maximum of 10 samples);
  - (D) per unit of 5000 SF or more (subject to adjustment if approved by the Department); and
- (2) a per unit cost for Final Visual Inspection of abated improvements including air monitoring; and
- (3) a per unit abatement price - to a maximum of 200 SF or LF;
  - (A) Non-Friable Asbestos;
    - (i) per square foot of asbestos materials;
    - (ii) per linear foot of asbestos materials
  - (B) Friable Asbestos;

- (i) per square foot of asbestos materials;
  - (ii) per linear foot of asbestos materials; and
- (4) a per unit cost for general clearings;
- (A) Residential (up to 1,500 SF);
    - (i) per square foot - frame;
    - (ii) per square foot - masonry or other;
  - (B) Commercial (up to 3,000 SF);
    - (i) per square foot - frame;
    - (ii) per square foot - masonry or other. The Proposal Request shall state that the Department intends to enter into a Retainer Contract for the term of one year and a maximum dollar amount of ~~two hundred and fifty thousand dollars (\$250,000.00)~~ one million dollars (\$1,000,000) each with a sufficient number of firms on a Statewide basis to perform Asbestos Inspections, Asbestos Removal, and Structure Clearing on an as needed basis.

(k) **NEGOTIATION OF CONTRACTS.** Upon receipt of the Proposals from the Selected Firms negotiations shall be initiated with the Selected Firms to produce a Retainer Contract with a term of one year and maximum amount of up to ~~two hundred and fifty thousand dollars (\$250,000.00)~~ one million dollars (\$1,000,000). Should negotiations fail to reach successful execution of a contract with any Selected Firm, the negotiations shall be terminated and shall be initiated with an Alternate Firm. The object of the negotiations shall be to establish an acceptable per unit cost for any Asbestos Investigations needed by the Department for the term of the contract and to establish an acceptable per square foot cost and per running foot cost for abatement of any asbestos discovered upon completion of the inspections and a unit cost for clearing of improvements. When agreement is reached on the unit costs, a Retainer Contract shall be executed with a sufficient number of Selected Firms to perform the anticipated work for the term of one year and shall provide for the scope of services enumerated in this Rule.

(l) **BOARD OF TRANSPORTATION APPROVAL AND EXECUTION OF CONTRACT.** After final negotiations are completed, the firm shall execute a minimum of two contract originals and submit them to the Consultant Coordinator. The Consultant Coordinator shall submit the contract to the State Highway Administrator who may consult with the Advisory Budget Commission pursuant to G.S. 136-28.1(f). The Manager of Right of Way shall submit the proposed contract to the Board of Transportation for approval. After the Board of Transportation approves the contract, the Manager of Right of Way shall execute and return the contract to the Right of Way Consultant Coordinator. The Right of Way Consultant Coordinator shall transmit one original contract to the contracting firm and shall retain one in the Central Office. The

Consultant Coordinator shall provide a copy of the contract to the DOT Fiscal Section.

(m) **REQUEST FOR SPECIFIC JOB ESTIMATES.** When the Department acquires Structures that require inspection for asbestos, two firms who have executed the Retainer Contract will be contacted by the Right of Way Branch, given the location of the Structure(s), and requested to submit a Work Assignment Cost Estimate. The first Firm's estimate shall cover Inspections, both preliminary and final; and the second Firm's Estimate shall be for Abatements, if any, and Clearing, if required, of the structure. The Estimate of Job Costs submitted by the contractor will be reviewed by Right of Way Staff Personnel to insure:

- (1) that the per unit cost is in compliance with those specified in the Retainer Contract; and
- (2) the quantities specified in the Estimate of Job Costs are reasonable. If the estimate is found to be reasonable, the Contract Administrator shall authorize the work by the Firm under the Retainer Contract by signing the Estimate document. If the estimate is unacceptable and agreement cannot be reached by negotiations with the Firm, an Estimate will be requested from another Firm on Retainer Contract and evaluated in the same manner until agreement is reached and work can be authorized. In the event that an agreement cannot be reached through negotiations with any firm on Retainer Contract, then the Department shall terminate negotiations and advertise for specific project bids under the provisions of Subparagraphs (b)(1) and (2) of this Rule.

(n) **SUB-CONTRACTING.** A Contracting Firm may sublet portions of the work proposed in the contract only upon approval of the Contract Administrator. The responsibility for procuring a subcontractor and assuring the acceptable performance of the work lies with the prime contractor. Also, the prime contractor will be responsible for submitting the proper supporting data to the Contract Administrator for all work that is proposed to be sublet.

(o) **METHODS OF COMPENSATION.** Cost Per Unit of Work - This method of compensation is suitable for contracts where the magnitude of work is uncertain but the character of work is known and a cost of the work per unit can be determined accurately.

(p) **ADMINISTRATION OF CONTRACT.** The administration of the contract shall be the responsibility of the Contract Administrator. This will include the review of invoices and recommendation for payment to the Fiscal Section.

(q) **CONTRACT AMENDMENTS.** Each contract shall contain procedures for contract modifications and define what changes can only be made by means of a contract amendment. The Department may, with the concurrence of the Manager of Right of Way, delete any clearing item.

(r) **MONITORING OF WORK.** The responsibility for monitoring the work, the schedule and performing reviews at intermediate stages of the work shall rest with the staff personnel. An inspector may be assigned on each job by the Division Engineer who shall make periodic status reports to the Division Right of Way Office. The firm will be required to provide a written progress report accompanying each invoice

**PROPOSED RULES**

describing the work performed for the project covered by the invoice.

(s) FINAL PAYMENT. When it is determined that the work is complete, the final invoice shall be approved by the Contract Administrator and forwarded to the Fiscal Section with a recommendation for payment. When the contract is terminated by the Department, the final payment shall be for that portion of work performed. Should the firm believe that additional compensations or time should be allowed for services not covered under the contract, the firm must notify the Department in writing within 30 days after receipt of final payment. The Department will render a decision on the claim which will be final, subject to review in accordance with Chapter 150B of the North Carolina General Statutes. Exhaustion of the administrative procedure described herein shall be a prerequisite to the firm's right of review.

(t) TERMINATION OF CONTRACTS. All contracts shall include a provision for the termination of the contract by the Department. Such termination by the Department shall be in writing and shall be effective upon receipt by the contracting firm.

(u) QUARTERLY REPORT. A quarterly report on the use of outside firms will be submitted to the Right of Way Branch Manager. This report shall be prepared by the Contract Administrator and will be in chart/graphic or other appropriate format. Copies shall be provided to the State Highway Administrator and the Assistant State Highway Administrator.

Authority G.S. 130A-444; 136-28.1(f).

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Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Transportation, Division of Motor Vehicles intends to amend the rule cited as 19A NCAC 03G .0205. Notice of Rule-making Proceedings was published in the Register on June 1, 2001.

Proposed Effective Date: August 1, 2002

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A demand for a public hearing must be made in writing and mailed to Emily Lee, NCDOT, 1501 Mail Service Center, Raleigh, NC 27699-1501. The demand must be received within 15 days of this Notice.

Reason for Proposed Action: This Rule is proposed for amendment due to concerns expressed to DMV by impacted school systems. The school systems have indicated they were unable to fund necessary medical exams by July 1, 2001. Many beginning drivers do not have funds to pay for the exams themselves. The school systems predict the pool of drivers will decrease unless school systems make arrangements for the physicals. The school systems must secure agreements from local health departments to perform the exams. The school systems must develop policies to handle issues resulting from the medical report forms including how to treat drivers with medical conditions revealed by the medical report forms.

Comment Procedures: Any interested person may submit written comments on the proposed rules by mailing the

comments to Emily Lee, NCDOT, 1501 Mail Service Center, Raleigh, NC 27699-1501 by November 5, 2001.

**Fiscal Impact**

- State
- Local
- Substantive ( $\geq$ \$5,000,000)
- None

**CHAPTER 03 – DIVISION OF MOTOR VEHICLES**

**SUBCHAPTER 03G – SCHOOL BUS AND TRAFFIC SAFETY SECTION**

**SECTION .0200 – SCHOOL BUS DRIVER TRAINING**

**19A NCAC 03G .0205 ISSUING OF ORIGINAL CERTIFICATE**

Any applicant for certification as a school bus driver shall meet the following minimum requirements:

- (1) Legal:
  - (a) Shall be at least 18 years of age with at least six months driving experience as an operator of a motor vehicle, and shall possess a valid North Carolina driver license of Class A, B, or C. In the event a prospective driver shall have his place of residence in another state, he may be certified as a school bus driver if he submits a copy of his driving record from the state in which he is licensed before his initial certification. Also, he must notify both his employer and the N.C. School Bus and Traffic Safety Section within 30 days of a conviction of any moving violation no matter what type of vehicle he was driving.
  - (b) Shall within a period of one year (12 months) immediately preceding certification have on his driving record:
    - (i) No more than one conviction of any moving violation;
    - (ii) No conviction whatever of:
      - (A) Reckless driving;
      - (B) Speeding in excess of 15 mph above the posted limit; or
      - (C) Passing a stopped school bus;
    - (iii) No conviction of a moving violation which was the proximate cause of an accident.
  - (c) Shall within a period of two years (24 months) immediately preceding certification have on his driving record no suspension or revocation of the driving privilege other than for such status offenses as:

- |  |  |
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| <p>(i) Lapsed liability insurance;</p> <p>(ii) Failure to appear in court;</p> <p>(iii) Failure to comply with out-of-state citation; or</p> <p>(iv) A 30 day revocation not accompanied by a subsequent conviction of driving while impaired.</p> <p>(d) Shall within a period of five years (60 months) immediately preceding certification have on his driving record:</p> <p style="padding-left: 20px;">(i) No more than three convictions of moving violations of any kind;</p> <p style="padding-left: 20px;">(ii) No more than two convictions of moving violations which were the proximate causes of accidents;</p> <p style="padding-left: 20px;">(iii) No conviction of driving while impaired;</p> <p style="padding-left: 20px;">(iv) No suspension or revocation of the driving privilege other than for:</p> <p style="padding-left: 40px;">(A) Those status offenses enumerated in Paragraph (c) of this Rule,</p> <p style="padding-left: 40px;">(B) Those offenses enumerated in G.S. 20-16(a), subsections (9) and (10).</p> <p>(e) Shall have on his driving record no more than one conviction of driving while impaired.</p> <p>(f) Shall have no "STOP" entry appearing on his driving record at the time of certification.</p> <p>(g) Shall have no record of any conviction of a violation of the criminal code greater than a misdemeanor for a period of at least five years immediately preceding certification. Further, shall never have had in any jurisdiction a conviction of an offense against the public morals, including but not limited to rape and child molestation.</p> <p>(h) Shall have a driving record which in its overall character arouses no serious question about the reliability, judgment, or emotional stability of the applicant.</p> <p>(i) Shall successfully complete the training course for school bus drivers.</p> <p>(2) Physical Standards for School Bus Drivers. Every school bus driver shall:</p> | <p>(a) Meet the physical standards set forth in The North Carolina Physician's Guide To Driver Medical Evaluation, published in June 1995 by the Division of Epidemiology, North Carolina Department of Health and Human Services, which is available without charge from the School Bus &amp; Traffic Safety Section of the Division of Motor Vehicles including any subsequent amendments and editions.</p> <p>(b) On and after July 1, <del>2004</del> <u>2003</u> at the time of his original certification as a school bus driver submit a medical report on a form provided by the Division and signed by a <del>physician</del> <u>physician, physician assistant, or nurse practitioner</u> licensed to practice <del>in North Carolina,</del> and submit such a medical form every two years thereafter.</p> <p>(c) On or before June 30, <del>2002</del> <u>2004</u> if he is certified before June 30, <del>2001</del> <u>2003</u> submit a medical report on a form provided by the division and signed by a <del>physician</del> <u>physician, physician assistant, or nurse practitioner</u> licensed to practice <del>in North Carolina</del> and submit such a medical report form every two years thereafter.</p> <p>(d) Be required at any time to submit a medical report on a form provided by the Division and signed by a physician licensed to practice in North Carolina if the Division has good and sufficient cause to believe the driver may not meet the physical standards noted in Subitem (2)(a) of this Rule.</p> |
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*Authority G.S. 20-39(b); 20-218.*

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**TITLE 21 – OCCUPATIONAL LICENSING BOARDS**

**CHAPTER 10 – BOARD OF CHIROPRACTIC EXAMINERS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Chiropractic Examiners intends to adopt the rules cited as 21 NCAC 10 .0207 - .0208. Notice of Rule-making Proceedings was published in the Register on June 15, 2001.*

**Proposed Effective Date:** July 1, 2002

**Public Hearing:**

**Date:** October 4, 2001

**Time:** 10:00 a.m.

**Location:** 174 Church Street, N. Concord, NC 28025

**Reason for Proposed Action:**

21 NCAC 10 .0207 - Until recently, continuing education seminars were offered only by chiropractic colleges and co-sponsored by the state chiropractic association. The colleges exercised adequate quality control, and the Board's approval was pro forma. However, within the last two years, a number of for-profit private companies have entered the continuing education marketplace; and their offerings have varied with respect to course content, instructor credential and seminar administration. The Board now believes that a rule setting forth the criteria for seminar approval is necessary.

21 NCAC 10 .0208 - The proposed rule is intended to enhance public health and safety by restricting the use of acupuncture by chiropractic physicians to those practitioners who have adequate training. The proposed minimum educational standards were developed in consultation with recognized chiropractic colleges and the Acupuncture Council of the N.C. Chiropractic Association.

**Comment Procedures:** Written comments may be submitted to the Secretary of the Board through October 17, 2001. Oral comments will be received at public hearing.

**Fiscal Impact**

- State
- Local
- Substantive (≥\$5,000,000)
- None

**SECTION .0200 – PRACTICE OF CHIROPRACTIC**

**21 NCAC 10 .0207 CONTINUING EDUCATION SEMINARS**

(a) Approval of Seminars. Only continuing education seminars approved in advance by the Board shall count towards satisfying the requirements for license renewal. The sponsor and co-sponsors of any proposed seminar shall be responsible for submitting to the Board all the information the Board deems necessary to evaluate the seminar in accordance with this Rule. An application for approval shall be in writing and shall be submitted at least 30 days prior to the date of the proposed seminar.

(b) Duration of Approval. A seminar approval issued by the Board shall expire one year after the date of issuance. If the sponsor or co-sponsors of an approved seminar wish to repeat the seminar on a date beyond the approval period, a new application shall be submitted to the Board.

(c) Criteria for Approval. The Board's criteria for approving continuing education seminars is as follows:

- (1) No practice-building or motivational seminars shall be approved;
- (2) No seminar shall be approved that requires attendees, in order to be able to utilize the information presented at the seminar, to purchase equipment or clinical supplies available only through the seminar's instructors, sponsors or co-sponsors;
- (3) Each seminar subject shall fall within the extent and limitation of chiropractic licensure in this State; and

(4) Each instructor shall submit a curriculum vitae and satisfy the Board that he is competent to teach the subject or subjects he is scheduled to teach.

(d) Duties of Seminar Sponsor. A proposed seminar having been approved by the Board, its sponsor and co-sponsors shall:

- (1) Disclose on all brochures and advertising materials the name and address of each sponsor and co-sponsor and whether each sponsor and co-sponsor is a for-profit or not-for-profit entity;
- (2) Be liable for all expenses incurred in holding the seminar;
- (3) Give timely notice to the Board of any material changes in the seminar, including date, location, subject matter or instructors; and
- (4) Provide an agent at the seminar site who shall:
  - (A) Monitor and report the attendance of each person attending the seminar, using a method approved by the Board;
  - (B) Provide for the safety and comfort of attendees;
  - (C) Supervise the agenda and disallow the presentation of any subject not approved by the Board; and
  - (D) Complete and submit to the Board a post-seminar review summarizing any problems experienced and any variance between the application for approval and the seminar as actually presented.

(e) Sanction for Non-Compliance. By applying for seminar approval, each sponsor and co-sponsor agrees to admit to the seminar at no charge a representative of the Board for the purpose of observing compliance with this Rule. If the Board determines that a sponsor or co-sponsor has willfully or negligently falsified the application for approval, or has failed to keep attendance accurately, or has allowed the seminar as actually presented to vary materially from the agenda as set forth in the application, or has willfully failed to adhere to any other provision of this Rule, the Board, in its discretion, may refuse to approve future seminar applications from the offending sponsor or co-sponsor or from any principal who is a partner or shareholder in the offending sponsor or co-sponsor.

Authority G.S. 90-142; 90-155.

**21 NCAC 10 .0208 ACCEPTABLE CARE**

(a) Standards set by the Board. The following standards of acceptable care in the practice of chiropractic have been established and defined by the Board of Examiners: - Acupuncture. In order to perform acupuncture, a licentiate shall first certify to the Board that he or she has completed a minimum of 100 hours' coursework offered or sponsored by a recognized chiropractic college in acupuncture-meridian therapy, including sterile needle technique, theory of acupuncture and differential diagnosis of clinical indications.

(b) Standards set by the Colleges. For any aspect of chiropractic practice, if the standard of acceptable care is not

defined in Paragraph (a) of this Rule, then the standard of acceptable care shall be the usual method of practice as taught in the majority of recognized chiropractic colleges.

Authority G.S. 90-142; 90-154.3.

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CHAPTER 12 – LICENSING BOARD FOR GENERAL CONTRACTORS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Licensing Board for General Contractors intends to amend the rules cited as 21 NCAC 12 .0103; .0202; .0204; .0503; .0818. Notice of Rule-making Proceedings was published in the Register on May 15, 2001.

Proposed Effective Date: August 1, 2002

Public Hearing:

Date: October 17, 2001

Time: 10:00 a.m.

Location: 3739 National Drive, Suite 225, Cumberland Bldg., Glenwood Place, Raleigh, NC

Reason for Proposed Action:

- 1. To amend power of Secretary – Treasurer to allow for designee to sign checks;
2. To amend licensure classifications to provide that if an applicant passes the building, public utilities, and highway examinations, license granted to the applicant will carry with it a designation of "unclassified";
3. To increase the financial responsibility requirements for working capital for limited, intermediate, and unlimited licenses and to increase the bond amounts required to demonstrate financial responsibility for limited, intermediate, and unlimited licenses;
4. To require a corporate licensee to notify the Board of its dissolution or suspension of its corporate charter within 30 days and to require a foreign corporation to notify the Board of revocation of its certificate of authority; and
5. To set a time limit within which an individual must file a request for a hearing.

Comment Procedures: Written comments may be submitted to Mark D. Selph at the Board's office. The Board's address is P.O. Box 17187, Raleigh, NC 27619. Any person may file written submission of comments or argument at any time up to the close of the hearing on October 17, 2001.

Fiscal Impact

- State
Local
Substantive (>=\$5,000,000)
None

CHAPTER 12 – LICENSING BOARD FOR GENERAL CONTRACTORS

SECTION .0100 – ORGANIZATION OF BOARD

21 NCAC 12 .0103 STRUCTURE OF BOARD

(a) Organization. The Board consists of nine members who are appointed by the Governor of North Carolina, with its composition in terms of its members being specified in G.S. 87-2.

(b) Officers. Annually, during the April meeting, the Board elects from its members a Chairman and Vice-Chairman. The Chairman shall preside over all meetings of the Board and perform such other duties as he may be directed to do by the Board. The Vice-Chairman shall function as Chairman in the absence of the Chairman.

(c) Secretary-Treasurer. In addition to those duties and responsibilities required of him by the North Carolina General Statutes, the Secretary-Treasurer, as the Board's Chief Administrative Officer, specifically has the responsibility and power to:

- (1) employ the clerical and legal services necessary to assist the Board in carrying out the requirements of the North Carolina General Statutes;
(2) purchase or rent whatever office equipment, stationery, or other miscellaneous articles as are necessary to keep the records of the Board;
(3) make expenditures from the funds of the Board by signing checks—checks, or authorizing the designee of the Secretary-Treasurer to sign checks, for expenditures after the checks are signed by the Chairman; Chairman or Vice-Chairman; and
(4) do such other acts as may be required of him by the Board.

(d) Meetings of the Board.

- (1) Regular meetings will be held during January, April, July and October of each year at the main office of the Board or at any other place so designated by the Board.
(2) Special Meetings. Special meetings of the Board will be held at the request of the Chairman or any two of the members at the main office of the Board or at any place fixed by the person or persons calling the meeting.
(3) Notice of Meetings. Regular meetings of the Board will be held after each Board member is duly notified by the Secretary-Treasurer of the exact date of the meeting. However, any person or persons requesting a special meeting of the Board will, at least two days before the meeting, give notice to the other members of the Board of that meeting by any usual means of communication. Such notice must specify the purpose for which the meeting is called.
(4) Quorum. Any five members of the Board which includes either the Chairman or Vice-Chairman shall constitute a quorum.

Authority G.S. 87-1 to 87-8.

SECTION .0200 – LICENSING REQUIREMENTS

21 NCAC 12 .0202

CLASSIFICATION

**PROPOSED RULES**

(a) A general contractor must be certified in one of five classifications. These classifications are:

- (1) **Building Contractor.** This classification covers all types of building construction activity including but not limited to: commercial, industrial, institutional, and all types of residential building construction; covers parking decks; all site work, grading and paving of parking lots, driveways, sidewalks, curbs, gutters, and septic systems which are ancillary to the aforementioned types of construction; and covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Masonry Construction), S(Roofing), S(Metal Erection), and S(Swimming Pools).
- (2) **Residential Contractor.** This classification covers all types of construction activity pertaining to the construction of residential units which are required to conform to the residential building code adopted by the Building Code Council pursuant to G.S. 143-138; covers all site work, driveways, sidewalks, and septic systems ancillary to the aforementioned construction; and covers the work done as part of such residential units under the specialty classifications of S(Insulation), S(Masonry Construction), S(Roofing), and S(Swimming Pools).
- (3) **Highway Contractor.** This classification covers all types of highway construction activity including but not limited to: grading, paving of all types, installation of exterior artificial athletic surfaces, relocation of public and private utility lines ancillary to the principal project, bridge construction and repair, parking decks, sidewalks, curbs, gutters and storm drainage. Includes installation and erection of guard rails, fencing, signage and ancillary highway hardware; covers paving and grading of airport and airfield runways, taxiways, and aprons, including the installation of signage, runway lighting and marking; and covers work done under the specialty classifications of S(Boring and Tunneling), S(Concrete Construction), S(Marine Construction) and S(Railroad Construction). If the contractor limits his activity to grading and does no other work described herein, upon proper qualification the classification of H(Grading and Excavating) may be granted.
- (4) **Public Utilities Contractor.** This classification includes those whose operations are the performance of construction work on septic systems and on the subclassifications of facilities set forth in G.S. 87-10(3). The Board may issue a license to a public utilities contractor that is limited to any of the subclassifications set forth in G.S. 87-10(3) for which the contractor qualifies. Within

appropriate subclassification, a public utilities contractor license covers work done under the specialty classifications of S(Boring and Tunneling), PU(Communications), PU(Fuel Distribution), PU(Electrical-Ahead of Point of Delivery), and S(Swimming Pools).

- (5) **Specialty Contractor.** This classification shall embrace that type of construction operation and performance of contract work outlined as follows:
  - (A) **H(Grading and Excavating).** Covers the digging, moving and placing of materials forming the surface of the earth, excluding air and water, in such a manner that the cut, fill, excavation, grade, trench, backfill, or any similar operation can be executed with the use of hand and power tools and machines commonly used for these types of digging, moving and material placing. Covers work on earthen dams and the use of explosives used in connection with all or any part of the activities described in this Subparagraph. Also includes clearing and grubbing, and erosion control activities.
  - (B) **S(Boring and Tunneling).** Covers the construction of underground or underwater passageways by digging or boring through and under the earth's surface including the bracing and compacting of such passageways to make them safe for the purpose intended. Includes preparation of the ground surfaces at points of ingress and egress.
  - (C) **PU(Communications).** Covers the installation of the following:
    - (i) All types of pole lines, and aerial and underground distribution cable for telephone systems;
    - (ii) Aerial and underground distribution cable for Cable TV and Master Antenna TV Systems capable of transmitting R.F. signals;
    - (iii) Underground conduit and communication cable including fiber optic cable; and
    - (iv) Microwave systems and towers, including foundations and excavations where required, when the microwave systems are being used for the purpose of transmitting R.F. signals; and installation of PCS or

**PROPOSED RULES**

- cellular telephone towers and sites.
- (D) S(Concrete Construction). Covers the construction and installation of foundations, pre-cast silos and other concrete tanks or receptacles, prestressed components, and gunite applications, but excludes bridges, streets, sidewalks, curbs, gutters, driveways, parking lots and highways.
- (E) PU(Electrical-Ahead of Point of Delivery). Covers the construction, installation, alteration, maintenance or repair of an electrical wiring system, including sub-stations or components thereof, which is or is intended to be owned, operated and maintained by an electric power supplier, such as a public or private utility, a utility cooperative, or any other properly franchised electric power supplier, for the purpose of furnishing electrical services to one or more customers.
- (F) PU(Fuel Distribution). Covers the construction, installation, alteration, maintenance or repair of systems for distribution of petroleum fuels, petroleum distillates, natural gas, chemicals and slurries through pipeline from one station to another. Includes all excavating, trenching and backfilling in connection therewith. Covers the installation, replacement and removal of above ground and below ground fuel storage tanks.
- (G) PU(Water Lines and Sewer Lines). Covers construction work on water and sewer mains, water service lines, and house and building sewer lines as defined in the North Carolina State Building Code, and covers water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations and pumping stations. Includes pavement patching, backfill and erosion control as part of such construction.
- (E) PU(Water Purification and Sewage Disposal). Covers the performance of construction work on septic systems, water and wastewater treatment facilities and covers all site work, grading, and paving of parking lots, driveways, sidewalks, and curbs and gutters which are ancillary to such construction of water and wastewater treatment facilities. Covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Masonry Construction), S(Roofing), and S(Metal Erection) as part of such work on water and wastewater treatment facilities.
- (F) S(Insulation). Covers the installation, alteration or repair of materials classified as insulating media used for the non-mechanical control of temperatures in the construction of residential and commercial buildings. Does not include the insulation of mechanical equipment and ancillary lines and piping.
- (G) S(Interior Construction). Covers the installation of acoustical ceiling systems and panels; drywall partitions (load bearing and non-load bearing), lathing and plastering, flooring and finishing, interior recreational surfaces, window and door installation, and installation of fixtures, cabinets and millwork. Includes the removal of asbestos and replacement with non-toxic substances.
- (H) S(Marine Construction). Covers all marine construction and repair activities and all types of marine construction in deep-water installations and in harbors, inlets, sounds, bays, and channels; covers dredging, construction and installation of pilings, piers, decks, slips, docks, and bulkheads. Does not include structures required on docks, slips and piers.
- (I) S(Masonry Construction). Covers the installation, with or without the use of mortar or adhesives, of the following:
- (i) Brick, concrete block, gypsum partition tile, pumice block or other lightweight and facsimile units and products common to the masonry industry;
  - (ii) Installation of fire clay products and refractory construction; and
  - (iii) Installation of rough cut and dressed stone, marble panels and slate units, and installation of structural glazed tile or block, glass brick or block, and solar screen tile or block.
- (M) S(Railroad Construction). Covers the building, construction and repair of railroad lines including:

PROPOSED RULES

- (i) The clearing and filling of rights-of-way;
  - (ii) Shaping, compacting, setting and stabilizing of road beds;
  - (iii) Setting ties, tie plates, rails, rail connectors, frogs, switch plates, switches, signal markers, retaining walls, dikes, fences and gates; and
  - (iv) Construction and repair of tool sheds and platforms.
- (N) S(Roofing). Covers the installation and repair of roofs and decks on residential, commercial, industrial, and institutional structures requiring materials that form a water-tight and weather-resistant surface. The term "materials" shall be defined for purposes of this Subparagraph to include, among other things, cedar, cement, asbestos, clay tile and composition shingles, all types of metal coverings, wood shakes, single ply and built-up roofing, protective and reflective roof and deck coatings, sheet metal valleys, flashings, gravel stops, gutters and downspouts, and bituminous waterproofing.
- (O) S(Metal Erection). Covers:
- (i) The field fabrication, erection, repair and alteration of architectural and structural shapes, plates, tubing, pipe and bars, not limited to steel or aluminum, that are or may be used as structural members for buildings, equipment and structure; and
  - (ii) The layout, assembly and erection by welding, bolting or riveting such metal products as, but not limited to, curtain walls, tanks of all types, hoppers, structural members for buildings, towers, stairs, conveyor frames, cranes and crane runways, canopies, carports, guard rails, signs, steel scaffolding as a permanent structure, rigging, flagpoles, fences, steel and aluminum siding, bleachers, fire escapes, and seating for stadiums, arenas, and auditoriums.
- (P) S(Swimming Pools). Covers the construction, service and repair of all swimming pools. Includes:
- (i) Excavation and grading;
  - (ii) Construction of concrete, gunite, and plastic-type pools, pool decks, and walkways, and tiling and coping; and
  - (iii) Installation of all equipment including pumps, filters and chemical feeders. Does not include direct connections to a sanitary sewer system or to portable water lines, nor the grounding and bonding of any metal surfaces or the making of any electrical connections.
- (Q) S(Asbestos). This classification covers renovation or demolition activities involving the repair, maintenance, removal, isolation, encapsulation, or enclosure of Regulated Asbestos Containing Materials (RACM) for any commercial, industrial, or institutional building, whether public or private. It also covers all types of residential building construction involving RACM during renovation or demolition activities.
- (b) An applicant may be licensed in more than one classification of general contracting provided the applicant meets the qualifications for the classifications, which includes passing the examination for the classifications in question. ~~The license granted to an applicant who meets the qualifications for all classifications will carry with it a designation of "unclassified."~~ If an applicant passes the building, public utilities, and highway examinations, the license granted to the applicant will carry with it a designation of "unclassified."

Authority G.S. 87-1; 87-10.

21 NCAC 12.0204 ELIGIBILITY

- (a) Limited License. The applicant for such a license must:
- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
  - (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least ~~twelve thousand five hundred dollars (\$12,500.00); twenty-five thousand dollars (\$25,000) as reflected in an audited financial statement prepared by a certified public accountant or an independent accountant who is engaged in the public practice of accountancy; and~~
  - (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant.
- (b) Intermediate License. The applicant for such a license must:

- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
  - (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least ~~fifty thousand dollars (\$50,000.00)~~ seventy-five thousand dollars (\$75,000.) as reflected in an audited financial statement prepared by a certified public accountant or an independent accountant who is engaged in the public practice of accountancy; and
  - (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant.
- (c) Unlimited License. The applicant for such a license must:
- (1) Be entitled to be admitted to the examination given by the Board in light of the requirements set out in G.S. 87-10 and Section .0400 of this Chapter;
  - (2) Be financially stable to the extent that the total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities by at least ~~one hundred thousand dollars (\$100,000.00)~~ one hundred fifty thousand dollars (\$150,000.00) as reflected in an audited financial statement prepared by a certified public accountant or an independent accountant who is engaged in the public practice of accountancy;
  - (3) Successfully complete 70 percent of the examination given the applicant by the Board dealing with the specified contracting classification chosen by the applicant.
- (d) In lieu of demonstrating the required level of working capital, an applicant may obtain a surety bond from a surety authorized to transact surety business in North Carolina pursuant to G.S. 58 Article 7, 16, 21, or 22. The surety shall ~~provide proof that it maintains~~ maintain a rating from A.M. Best, or its successor rating organization, of either Superior (A++ or A+) or Excellent (A or A-). The bond shall be continuous in form and shall be maintained in effect for as long as the applicant maintains a license to practice general contracting in North Carolina or until the applicant demonstrates the required level of working capital. The application form and subsequent annual license renewal forms shall require proof of a surety bond meeting the requirements of this Rule. The applicant shall maintain the bond in the amount of ~~fifty thousand dollars (\$50,000.00)~~ two hundred fifty thousand dollars (\$250,000) for a limited license, ~~two hundred fifty thousand dollars (\$250,000.00)~~ seven hundred fifty thousand dollars (\$750,000) for an intermediate license, and ~~five hundred thousand dollars (\$500,000.00)~~ one million five hundred thousand dollars (\$1,500,000) for an unlimited license. The bond shall list State of North Carolina as obligee and be for the benefit of any person who is damaged by an act or omission of the applicant constituting breach of a construction contract or breach of a contract for the furnishing of labor, materials, or professional

services to construction undertaken by the applicant, or by an unlawful act or omission of the applicant in the performance of a construction contract. The bond required by this Rule shall be in addition to and not in lieu of any other bond required of the applicant by law, regulation, or any party to a contract with the applicant. Should the surety cancel the bond, the surety and the applicant both shall notify the Board immediately in writing. If the applicant fails to provide written proof of financial responsibility in compliance with this Rule within 30 days of the bond's cancellation, then the applicant's license shall be suspended until written proof of compliance is provided. After a suspension of two years, the applicant shall fulfill all requirements of a new applicant for licensure. The practice of general contracting by an applicant whose license has been suspended pursuant to this Rule will subject the applicant to additional disciplinary action by the Board.

(e) Reciprocity. If an applicant is licensed as a general contractor in another state, the Board, in its discretion, need not require the applicant to successfully complete the written examination as provided by G.S.87-15.1. However, the applicant must comply with all other requirements of these rules to be eligible to be licensed in North Carolina as a general contractor.

(f) Accounting and reporting standards. Working capital, balance sheet with current and fixed assets, current and long term liabilities, and other financial terminologies used herein shall be construed in accordance with those standards referred to as "generally accepted accounting principles" as promulgated by the Financial Accounting Standards Board, the American Institute of Certified Public Accountants, and, if applicable, through pronouncements of the Governmental Accounting Standards Board, or their predecessor organizations. An audited financial statement, an unqualified opinion, and other financial reporting terminologies used herein shall be construed in accordance with those standards referred to as "generally accepted auditing standards" as promulgated by the American Institute of Certified Public Accountants through pronouncements of the Auditing Standards Board.

*Authority G.S. 87-1; 87-10.*

**SECTION .0500 - LICENSE**

**21 NCAC 12. 0503 RENEWAL OF LICENSE**

(a) Form. An application for renewal requires the holder of a valid license to set forth whether there were any changes made in the status of the licensee's business during the preceding year and also requires the holder to give a financial statement for the business in questions. The financial statement need not be prepared by a certified public accountant or by a qualified independent accountant but may be completed by the holder of a license on the form itself. However, the Board may require a license holder to submit an audited financial statement if there is any evidence indicating that the license holder may be unable to meet his financial obligations. Except as provided herein, evidence of financial responsibility shall be subject to approval by the Board in accordance with the requirements of Rule .0204 of this Chapter. A licensee may be required to provide evidence of continued financial responsibility satisfactory to the Board should circumstances render such evidence necessary, and shall provide the Board with a copy of any bankruptcy petition filed

**PROPOSED RULES**

by the licensee within 30 days of its filing. A corporate licensee shall notify the Board of its dissolution or suspension of its corporate charter within 30 days of such dissolution or suspension.

(b) Display. The certificate of renewal of license granted by the Board, containing the signatures of the Chairman and the Secretary-Treasurer, must be displayed at all times by the licensee at his place of business.

Authority G.S. 87-1; 87-10.

**SECTION .0800 – CONTESTED CASES**

**21 NCAC 12 .0818 REQUEST FOR HEARING**

(a) Any time an individual believes their rights, duties, or privileges have been affected by the Board's administrative action, but has not received notice of a right to an administrative hearing, that individual may file a formal request for a hearing.

(b) Before an individual may file a request he must first exhaust all reasonable efforts to resolve the issue informally with the Board.

(c) Subsequent to such informal action, if still dissatisfied, the individual should submit a request to the Board's office, with the request bearing the notation: REQUEST FOR ADMINISTRATIVE HEARING. The request should contain the following information:

- (1) Name and address of the Petitioner,
- (2) A concise statement of the action taken by the Board which is challenged,
- (3) A concise statement of the way in which the Petitioner has been aggrieved, and
- (4) A clear and specific statement of request for a hearing.

(d) A request for administrative hearing must be submitted to the Board's office within 60 days of receipt of notice of the action taken by the Board which is challenged. The request will be acknowledged promptly and, if deemed appropriate by the Board, a hearing will be scheduled.

Authority G.S. 87-11(b); 150B-11; 150B-38.

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**CHAPTER 20 – BOARD OF REGISTRATION FOR FORESTERS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Registration for Foresters intends to amend the rule cited as 21 NCAC 20 .0115. Notice of Rule-making Proceedings was published in the Register on July 2, 2001.*

**Proposed Effective Date:** August 1, 2002

**Public Hearing:**

**Date:** September 20, 2001

**Time:** 9:00 a.m.

**Location:** Wake County Office Center, Ag. Building, Room 127, 4001 E. Carya Drive, Raleigh, NC

**Reason for Proposed Action:** The Society of American Foresters (SAF) Code of Ethics which the Board has used since

1976 was rewritten recently. The previous wording of the rule .0115 would automatically change the Board's code to the new SAF code if this change were not made. The Board feels the 1976 code is more appropriate for carrying out its responsibilities than is the new SAF code.

**Comment Procedures:** Mail written comments to NC Board of Registration for Foresters, PO Box 27393, Raleigh, NC 27611. Comments must be received no later than October 4, 2001.

**Fiscal Impact**

- State
- Local
- Substantive (>=\$5,000,000)
- None

**SECTION .0100 – PURPOSE**

**21 NCAC 20 .0115 CODE OF ETHICS**

The Board ~~has selected~~ hereby incorporates by reference the code of ethics ~~of adopted by~~ the Society of American Foresters on June 23, 1976 and amended November 2, 1992 as guidance for the professional code to be followed by registered foresters ~~to follow~~ in their ~~forestry~~ forestry practice and their conduct with clients and professional colleagues. This incorporation does not include subsequent amendments and editions. Copies may be obtained from the Board of Registration at no charge. This code of ethics is adopted by reference under G.S. 150B-14(e). In each individual canon the title Registered Forester (RF) will shall be substituted for the word "member". The canons in the code of ethics are part of the registration application, and all applicants will shall indicate their agreement to conform with them in their signed affidavits. They will shall be used by the Board to help govern its decisions in adjudicating unethical conduct and other conduct charges ~~flagrant misconduct in the practice of forestry~~ under G.S. 89B-13.

Authority G.S. 89B-6; 89B-9; 89B-13.

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**CHAPTER 36 – BOARD OF NURSING**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Nursing intends to amend the rule cited as 21 NCAC 36 .0109. Notice of Rule-making Proceedings was published in the Register on July 2, 2001.*

**Proposed Effective Date:** July 1, 2002

**Public Hearing:**

**Date:** September 27, 2001

**Time:** 1:00 p.m.

**Location:** NC Board of Nursing Office, 3724 National Drive, Suite 201, Raleigh, NC

**Reason for Proposed Action:** As a cost savings measure, the Board proposes to publish and disseminate the Bulletin newsletter three times per year instead of four.

**Comment Procedures:** *Comments regarding this action should be directed to Jean H. Stanley, APA Coordinator, North Carolina Board of Nursing, Post Office Box 2129, Raleigh, North Carolina 27602 by October 4, 2001.*

**Fiscal Impact**

- State
- Local
- Substantive (≥\$5,000,000)
- None

**SECTION .0100 – GENERAL PROVISIONS**

**21 NCAC 36 .0109 SELECTION AND QUALIFICATIONS OF NURSE MEMBERS**

(a) Vacancies in nurse member positions on the Board that are scheduled to occur during the next year shall be announced in the ~~December-last~~ issue of the North Carolina Board of Nursing "~~Bulletin~~", "~~Bulletin~~" for the calendar year, which shall be mailed to the address on record for each North Carolina ~~currently~~ licensed ~~nurse on December 1-nurse~~. The "Bulletin" shall include a petition form for nominating a nurse to the Board and information on filing the petition with the Board.

(b) Each petition shall be checked with the records of the Board to validate that the nominee and each petitioner hold a current North Carolina license to practice nursing. If the nominee is found to be not currently licensed, the petition shall be declared invalid. If any petitioners are found to be not currently licensed and this finding decreases the number of petitioners to less than ten, the petition shall be declared invalid.

(c) On a form provided by the Board, each nominee shall indicate the category for which nominee is seeking election, shall attest to meeting the qualifications specified in G.S. 90-171.21(d) and shall provide written permission to be listed on the ballot. The form must be postmarked on or before April 15.

(d) The majority of employment income of registered nurse members of the Board, must be earned by holding positions with primary responsibilities in nursing education or in nursing practice which includes administration, supervision, planning, delivery or evaluation of nursing care as specified in G.S. 90-171.21(d). The following apply in determining qualifications for registered nurse categories of membership:

- (1) Nurse Educator includes any nurse who teaches in or directs a basic or graduate nursing program; or who teaches in or directs a continuing education or staff development program for nurses.
- (2) Hospital is defined as any facility which has an organized medical staff and which is designed, used, and primarily operated to provide health care, diagnostic and therapeutic services, and continuous nursing to inpatients.
- (3) Hospital Nursing Service Director is any nurse who is the chief executive officer for nursing service.
- (4) Employed by a hospital includes any nurse employed by a hospital.
- (5) Employed by a physician includes any nurse employed by a physician or group of physicians licensed to practice medicine in

- North Carolina and engaged in private practice.
- (6) Employed by skilled or intermediate care facility includes any nurse employed by a long term nursing facility.
- (7) Registered nurse approved to perform medical acts includes any nurse approved for practice in North Carolina as a Nurse Practitioner or Certified Nurse Midwife.
- (8) Community health nurse includes any nurse who functions as a generalist or specialist in areas including, but not limited to, public health, student health, occupational health or community mental health.

(e) The term "nursing practice" when used in determining qualifications for registered or practical nurse categories of membership, means any position for which the holder of the position is required to hold a current license to practice nursing.

(f) A nominee shall be listed in only one category on the ballot.

(g) If there is no nomination in one of the registered nurse categories, all registered nurses who have been duly nominated and qualified shall be eligible for an at-large registered nurse position. A plurality of votes for the registered nurse not elected to one of the specified categories shall elect that registered nurse to the at-large position.

(h) Separate slates shall be prepared for election of registered nurse nominees and for election of licensed practical nurse nominees. Nominees shall be listed in random order on the slate for licensed practical nurse nominees and within the categories for registered nurse nominees. Slates shall be published in the "Bulletin" following the Spring Board meeting and shall be accompanied by biographical data on nominees and a passport-type photograph.

(i) Any nominee may withdraw her/his name at any time by written notice prior to the date and hour fixed by the Board as the latest time for voting. Such nominee shall be eliminated from the contest and any votes cast for that nominee shall be disregarded.

(j) The procedure for voting shall be identified in the "Bulletin" following the Spring Board meeting, together with a notice designating the latest day and hour for voting.

(k) The Board of Nursing may contract with a computer or other service to receive the votes and tabulate the results.

(l) The tabulation and verification of the tabulation of votes shall include the following:

- (1) The certificate number shall be provided for each individual voting.
- (2) The certificate number shall be matched with the database from the Board.

(m) A plurality vote shall elect. If more than one person is to be elected in a category, the plurality vote shall be in descending order until the required number has been elected. In any election, if there is a tie vote between nominees, the tie shall be resolved by a draw from the names of nominees who have tied.

(n) The results of an election shall be recorded in the minutes of the next regular meeting of the Board of Nursing following the election and shall include at least the following:

- (1) the number of nurses eligible to vote,
- (2) the number of votes cast; and
- (3) the number of votes cast for each person on the slate.

PROPOSED RULES

(o) The results of the election shall be forwarded to the Governor and the Governor shall commission those elected to the Board of Nursing.
(p) All petitions to nominate a nurse, signed consents to appear on the slate, verifications of qualifications, and copies of the computerized validation and tabulation shall be retained for a period of three months following the close of an election.

Authority G.S. 90-171.21; 90-171.23(b).

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CHAPTER 46 – BOARD OF PHARMACY

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Pharmacy intends to adopt the rules cited as 21 NCAC 46 .1817, .2506 and amend the rules cited as 21 NCAC 46 .1814, .2004, .2502. Notice of Rule-making Proceedings was published in the Register on May 15, 2001.

Proposed Effective Date: August 1, 2002

Public Hearing:

Date: October 4, 2001

Time: 10:00 a.m.

Location: Brody School of Medicine, Brody Auditorium, 600 Moye Blvd., Greenville, NC

Date: October 12, 2001

Time: 9:00 a.m.

Location: Mountain AHEC, Classroom 4, 501 Biltmore Ave., Asheville, NC

Date: October 29, 2001

Time: 1:30 p.m.

Location: Sheraton Greensboro Hotel at Four Seasons, Greensboro, NC

Reason for Proposed Action: To clarify pharmacist supervision requirements with respect to automated dispensing or drug supply devices and to clarify requirements for removal of drugs from dispensing devices in the absence of a pharmacist; to set out time limit within which an individual may request a formal hearing; to require that documentation of dispensing errors be readily retrievable and available for inspection at permitted location; to set out exemptions from wearing of identification badges requirement; and to allow pharmacist to demand proof of identification from person picking up a prescription.

Comment Procedures: Persons wishing to present oral data, views or arguments on a proposed rule or rule change, may file a notice with the Board at least 10 days prior to the public hearing at which the person wishes to speak. Comments should be limited to 10 minutes. The Board of Pharmacy's address is PO Box 459, Carrboro, NC 27510-0459. Written submission of comments or argument will be accepted at any time up to and including October 31, 2001.

Fiscal Impact

- State
Local
Substantive (>\$5,000,000)
None

SECTION .1800 – PRESCRIPTIONS

21 NCAC 46 .1814 AUTOMATED DISPENSING OR DRUG SUPPLY DEVICES

(a) Automated dispensing or drug supply devices may be used in health care facility pharmacies and where a pharmacy permit exists, for maintaining patient care unit medication inventories or for a patient profile dispensing system, provided the utilization of such devices is under the supervision of a pharmacist. The pharmacist-manager shall develop and implement procedures to assure safe and effective use of medications, and, at a minimum, shall assure that:

- (1) only authorized personnel, as indicated by written policies and procedures, may obtain access to the drug inventories;
(2) all drugs therein are reviewed no less than monthly;
(3) a system of accountability must exist for all drugs contained therein; the purity, potency, and integrity of the drugs shall be preserved;
(4) the device provides records required by this Section and other applicable laws and rules;
(5) requirements for controlled substances security are met; and
(6) prior to the drug being released for access by the nurse, the pharmacist enters the medication order into a computerized pharmacy profile that is interfaced to the automated dispensing unit, so that drug allergy screening, therapeutic duplication, and appropriate dose verification is done prior to the drug being administered.

(b) Pharmacist supervision shall include: Notwithstanding the provisions of 21 NCAC 46 .2501, a pharmacist is required to supervise only the following activities pursuant to this Rule:

- (1) The packaging and labeling of drugs to be placed in the dispensing devices. Such packaging and labeling shall conform to all requirements pertaining to containers and label contents;
(2) The placing of previously packaged and labeled drug units into the dispensing device; and
(3) The restocking of automated dispensing devices.
(4) In the absence of a pharmacist, a person legally qualified to administer drugs may remove drugs from the dispensing devices only in the quantity of doses needed to satisfy immediate patient needs.

(c) In the absence of a pharmacist, a person legally qualified to administer drugs may remove drugs from the dispensing devices only in the quantity of doses needed to satisfy immediate patient needs.

~~(e)(d)~~ Bar code scanning of drug packaging and storage units may be utilized as a quality control mechanism if this technology is available in the automated dispensing system.

~~(d) Restocking of automated dispensing devices may be done by pharmacy technicians under the supervision of the pharmacist.~~

Authority G.S. 90-85.6; 90-85.32; 90-85.33.

**21 NCAC 46 .1817 PROOF OF IDENTIFICATION**

~~(a) As a precondition to filling any prescription or dispensing any drug, a pharmacist or person acting at the direction of a pharmacist may demand, inspect and record proof of identification, including valid photographic identification, from any patient presenting a prescription or any person acting on behalf of the patient. Valid photographic identification includes but is not limited to the following:~~

- ~~(1) A valid motor vehicle operator's license;~~
- ~~(2) A valid identification card;~~
- ~~(3) A valid United States passport; or~~
- ~~(4) Other valid, tamper-resistant, photographic identification.~~

~~(b) A pharmacist or person acting at the direction of a pharmacist may exercise discretion and refuse to fill any prescription or dispense any drug if unsatisfied as to the legitimacy or appropriateness of any prescription presented, the validity of any photographic identification or the identity of any patient presenting a prescription or any person acting on behalf of the patient. Refusal to fill pursuant to this Paragraph shall be noted on the prescription by the pharmacist or person acting at the direction of a pharmacist.~~

Authority G.S. 90-85.6; 90-85.32.

**SECTION .2000 – ADMINISTRATIVE PROVISIONS**

**21 NCAC 46 .2004 REQUEST FOR HEARING**

(a) Any time an individual believes that individual's rights, duties, or privileges have been affected by the Board's administrative action, but has not received notice of a right to an administrative hearing, that individual may file a formal request for a hearing.

(b) Before an individual may file a request, that individual is encouraged to exhaust all reasonable efforts to resolve the issue informally with the Board.

(c) Subsequent to such informal action, if still dissatisfied, the individual should submit a request to the Board's office, with the request bearing the notation: REQUEST FOR ADMINISTRATIVE HEARING. The request should contain the following information:

- (1) name and address of the petitioner;
- (2) a concise statement of the action taken by the Board which is challenged;
- (3) a concise statement of the way in which the petitioner has been aggrieved; and
- (4) a clear and specific statement of request for a hearing.

~~(d) A request for administrative hearing must be submitted to the Board's office within 60 days of the action taken by the Board which is challenged.~~ The request will be acknowledged promptly and, if deemed appropriate by the Board in accordance with 21 NCAC 46 .2005, a hearing will be scheduled.

Authority G.S. 90-85.6; 150B-11; 150B-38.

**SECTION .2500 – MISCELLANEOUS PROVISIONS**

**21 NCAC 46 .2502 RESPONSIBILITIES OF PHARMACIST-MANAGER**

(a) The pharmacist-manager shall assure that prescription legend drugs and controlled substances are safe and secure within the pharmacy.

(b) The pharmacist-manager employed or otherwise engaged to supply pharmaceutical services may have a flexible schedule of attendance but shall be present for at least one-half the hours the pharmacy is open or 32 hours a week, whichever is less.

(c) Whenever a change of ownership or change of pharmacist-manager occurs, the successor pharmacist-manager shall complete an inventory of all controlled substances in the pharmacy within 10 days. A written record of such inventory, signed and dated by the successor pharmacist-manager, shall be maintained in the pharmacy with other controlled substances records for a period of three years.

(d) The pharmacist-manager shall develop and implement a system of inventory record-keeping and control which will enable that pharmacist-manager to detect any shortage or discrepancy in the inventories of controlled substances at that pharmacy at the earliest practicable time.

(e) The pharmacist-manager shall maintain complete authority and control over any and all keys to the pharmacy and shall be responsible for the ultimate security of the pharmacy. A pharmacy shall be secured to prohibit unauthorized entry if no pharmacist will be present in the pharmacy for a period of 90 minutes or more.

(f) These duties are in addition to the specific duties of pharmacist-managers at institutional pharmacies and pharmacies in health departments as set forth in the Rules in this Chapter.

(g) A person shall not serve as pharmacist-manager at more than one pharmacy at any one time except for limited service pharmacies.

(h) When a pharmacy is to be closed permanently, the pharmacist-manager shall inform the Board and the United States Drug Enforcement Administration of the closing, arrange for the proper disposition of the pharmaceuticals and return the pharmacy permit to the Board's offices within 10 days of the closing date. Notice of the closing shall be given to the public by posted notice at the pharmacy at least 30 days prior to the closing date and, if possible, 15 days after the closing date. Such notice shall notify the public that prescription files may be transferred to a pharmacy of the patient's or customer's choice during the 30 day period prior to the closing date. During the 30 day period prior to the closing date, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy chosen by the patient or customer, upon request. Absent specific instructions from the patient or customer, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy for maintenance of patient therapy and shall inform the public of such transfer by posted notice at the pharmacy for 15 days after the closing date, if possible. Controlled substance records shall be retained for the period of time required by law.

**PROPOSED RULES**

(i) Notice of the temporary closing of any pharmacy for more than 14 consecutive days shall be given to the public by posted notice at the pharmacy at least 30 days prior to the closing date, and, if possible, 15 days after the closing date. Such notice shall notify the public that prescription files may be transferred to a pharmacy of the patient's or customer's choice during the 30 day period prior to the closing date. During the 30 day period prior to the closing date, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy chosen by the patient or customer, upon request.

(j) The pharmacist-manager shall prepare a plan to safeguard prescription records and pharmaceuticals in the event of a natural disaster such as hurricane or flood.

(k) The pharmacist-manager shall separate from the dispensing stock all drug products more than six months out of date.

(l) The pharmacist-manager shall report to the Board of Pharmacy information that reasonably suggests that there is a probability that a prescription drug or device dispensed from a location holding a permit has caused or contributed to the death of a patient or customer. This report shall be filed in writing on a form provided by the Board within 14 days of the owner representative or pharmacist-manager's becoming aware of the event. The pharmacist-manager shall retain all documents, labels, vials, supplies, substances and internal investigative reports relating to the event. All such items shall be made available to the Board upon request.

(m) The Board shall not disclose the identity of a pharmacist-manager who makes a report under Paragraph (k) of this Rule, except as required by law. All reports made under Paragraph (k) of this Rule shall not be released except as required by law.

(n) Dispensing errors which are not detected and corrected prior to the patient receiving the medication shall be documented and reported to the pharmacist-manager. Documentation shall include pertinent chronological information and appropriate forms including the identity of individual(s) responsible. These documents, including action taken as part of a quality assurance plan, shall be archived in a readily retrievable manner and available for inspection-open for review, copying or seizure by the Board or its designated employees within 48 hours of a request for inspection for a period of three years. These documents shall ~~not~~ be released only to the Board or its designated employees pursuant to an investigation and shall not otherwise be released except as required by law. Upon request by the Board or its designated employees, these documents shall be transmitted by the pharmacist-manager to an office of the Board.

(o) In any Board proceeding, the Board shall consider compliance with Paragraphs (l) and (n) of this Rule as a mitigating factor and noncompliance with Paragraphs (l) and (n) of this Rule as an aggravating factor.

Authority G.S. 90-85.6; 90-85.21; 90-85.25; 90-85.26; 90-85.32.

**21 NCAC 46 .2506 EXCEPTIONS TO HEALTH CARE PRACTITIONERS IDENTIFICATION REQUIREMENTS**

(a) A pharmacist is not required to wear a readily visible badge or other form of identification in the following direct patient care situations:

- (1) procedures requiring full sterile dress; or
- (2) procedures requiring other protective clothing or covering.

(b) Identification of a pharmacist may be limited to first name only with reference to licensure or other professional designation when the full name identification may:

- (1) place the personal safety of the pharmacist in jeopardy; or
- (2) interfere with the therapeutic relationship between the pharmacist and client(s).

Authority G.S. 90-640.

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**CHAPTER 64 – BOARD OF EXAMINERS OF SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Examiners for Speech and Language Pathologists intends to adopt the rules cited as 21 NCAC 64 .0210 - .0211. Notice of Rule-making Proceedings was published in the Register on June 1, 2001.*

**Proposed Effective Date:** August 1, 2001

**Public Hearing:**

**Date:** October 5, 2001

**Time:** 1:00 p.m.

**Location:** Four Points Hotel, 4501 Creedmore Rd., Raleigh, NC

**Reason for Proposed Action:** *A misunderstanding came to Board's attention concerning qualifications for exempt technicians.*

**Comment Procedures:** *Comment period will remain open through October 5, 2001.*

**Fiscal Impact**

- State
- Local
- Substantive (≥\$5,000,000)
- None

**SECTION .0200 – INTERPRETATIVE RULES**

**21 NCAC 64 .0210 CERTIFIED TECHNICIANS**

(a) The Board interprets the term "certified technician" as used in G.S. 90-294(f) to be synonymous with "certified audiometric technician", "certified industrial audiometric technician", or similar designations used for non-licensed audiometric technicians in industry.

(b) Certified audiometric technicians may perform air conduction, threshold audiograms required by the Occupational Safety and Health Act (OSHA) for industrial hearing

conservation programs, provided that the following three conditions are met:

- (1) The audiometric technician has received appropriate instruction, including supervised practicum, in the principles and specific techniques for testing hearing in the industrial environment. The standards established by the Council for Accreditation of Occupational Hearing Conservation (CAOHC) for certified occupational hearing conservationists meet this training requirement. Where other training programs are used, the curriculum shall be in writing and available for inspection by the Board of Examiners, if necessary;
- (2) Supervision of the audiometric technician must be vested in a licensed audiologist; and
- (3) A licensed audiologist who supervises the activities of audiometric technicians, whether as employer or program consultant, must provide sufficient on-site supervision of the technicians to ensure continuous adherence to

the standards of this statute as well as relevant OSHA regulations.

*Authority G.S. 90-304(a)(3).*

**21 NCAC 64 .0211 NAME AND QUALIFICATIONS IDENTIFICATION BADGES**

(a) Persons licensed or registered under G.S. 90-292 et seq. shall be required to wear an identification badge or other form of identification displaying the name of the person and license or registration qualification held by such person, in type readable from a distance of three feet, as required by the provisions of G.S. 90-640.

(b) A person may be exempted from this requirement if such person's employer certifies to the Board of Examiners that the person's safety requires that an identification badge not be worn, or if the person applies for an exemption from this requirement for any reason deemed sufficient by the Board of Examiners.

*Authority G.S. 90-304(a)(3); 90-640.*

*This Section includes temporary rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code and includes, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements. Pursuant to G.S. 150B-21.1(e), publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings unless this notice has been previously published by the agency.*

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

**Rule-making Agency:** *Commission for Health Services*

**Rule Citation:** *15A NCAC 19A .0401*

**Effective Date:** *August 1, 2001*

**Findings Reviewed and Approved by:** *Beecher R. Gray*

**Authority for the rulemaking:** *G.S. 130A-125(c); 130A-155.1*

**Reason for Proposed Action:** *Because of a national shortage of tetanus vaccine (one of the two manufactures of tetanus vaccine decided to get out of the business), the National Advisory Committee on Immunization Practices and the Centers for Disease Control have recommended that states immediately prioritize the use of scarce tetanus vaccine supplies for individuals at highest risk and that states temporarily remove legal requirements for adult booster doses. In accordance with this national recommendation, this amendment will temporarily remove the requirement upon college entrance of a booster dose within the last ten years prior to college entrance. Making this change will ensure that scarce tetanus vaccine supplies will be available for those at highest risk. It is anticipated tetanus supplies will be back to normal by the spring of 2002.*

**Comment Procedures:** *Comments should be mailed to Chris Hoke, 2001 Mail Service Center, Raleigh, 27699-2001, Telephone (919) 715-4168, e-mail Chris.Hoke@ncmail.net.*

**CHAPTER 19 – HEALTH: EPIDEMIOLOGY**

**SUBCHAPTER 19A – COMMUNICABLE DISEASE CONTROL**

**SECTION .0400 - IMMUNIZATION**

**15A NCAC 19A .0401 DOSAGE AND AGE REQUIREMENTS FOR IMMUNIZATION**

Every individual in North Carolina required to be immunized pursuant to G.S. 130A-152 through 130A-157 shall be immunized against the following diseases by receiving the specified minimum doses of vaccines by the specified ages:

- (1) Diphtheria, tetanus, and whooping cough vaccine -- five doses: three doses by age seven months and two booster doses, one by age 19 months and the second on or after the fourth birthday and before enrolling in school (K-1) for the first time. The requirements for booster doses of diphtheria, tetanus, and whooping cough vaccine shall not apply to individuals

who enrolled for the first time in the first grade before July 1, 1987. However:

- (a) An individual who has attained his or her seventh birthday without having been immunized against whooping cough shall not be required to be immunized with a vaccine preparation containing whooping cough antigen;
  - (b) Individuals who receive the first booster dose of diphtheria, tetanus, and whooping cough vaccine on or after the fourth birthday shall not be required to have a second booster dose;
  - (c) Individuals attending school, college or university or who began their tetanus/diphtheria toxoid series on or after the age of seven years shall be required to have three doses of tetanus/diphtheria ~~toxoid of which one must have been within the last 10 years-toxoid.~~
- (2) Poliomyelitis vaccine--four doses: two doses of trivalent type by age five months; a third dose trivalent type before age 19 months, and a booster dose of trivalent type on or after the fourth birthday and before enrolling in school (K-1) for the first time. However:
- (a) An individual attending school who has attained his or her 18th birthday shall not be required to receive polio vaccine;
  - (b) Individuals who receive the third dose of poliomyelitis vaccine on or after the fourth birthday shall not be required to receive a fourth dose;
  - (c) The requirements for booster doses of poliomyelitis vaccine shall not apply to individuals who enrolled for the first time in the first grade before July 1, 1987.
- (3) Measles (rubeola) vaccine--two doses of live, attenuated vaccine administered at least 30 days apart: one dose on or after age 12 months and before age 16 months and a second dose before enrolling in school (K-1) for the first time. However:
- (a) An individual who has been documented by serological testing to have a protective antibody titer against measles shall not be required to receive measles vaccine;

- (b) An individual who has been diagnosed prior to January 1, 1994, by a physician licensed to practice medicine as having measles (rubeola) disease shall not be required to receive measles vaccine;
  - (c) An individual born prior to 1957 shall not be required to receive measles vaccine;
  - (d) The requirement for a second dose of measles vaccine shall not apply to individuals who enroll in school (K-1) or in college or university for the first time before July 1, 1994.
- (4) Rubella vaccine--one dose of live, attenuated vaccine on or after age 12 months and before age 16 months. However:
- (a) An individual who has been documented by serologic testing to have a protective antibody titer against rubella shall not be required to receive rubella vaccine;
  - (b) An individual who has attained his or her fiftieth birthday shall not be required to receive rubella vaccine;
  - (c) An individual who entered a college or university after his or her thirtieth birthday and before February 1, 1989 shall not required to meet the requirement for rubella vaccine.
- (5) Mumps vaccine--one dose of live, attenuated vaccine administered on or after age 12 months and before age 16 months. However:
- (a) An individual born prior to 1957 shall not be required to receive mumps vaccine;
  - (b) The requirements for mumps vaccine shall not apply to individuals who enrolled for the first time in the first grade before July 1, 1987 or in college or university before July 1, 1994. An individual who has been documented by serological testing to have a protective antibody titer against mumps shall not be required to receive mumps vaccine.
- (6) *Haemophilus influenzae, b*, conjugate vaccine--three doses of HbOC or two doses of PRP-OMP before age seven months and a booster dose of any type on or after age 12 months and by age 16 months. Individuals born before October 1, 1988 shall not be required to be vaccinated against *Haemophilus influenzae, b*. Individuals who receive the first dose of *Haemophilus influenzae, b*, vaccine on or after 12 months of age and before 15 months of age shall be required to have only two doses of HbOC or PRP-OMP. Individuals who receive the first dose of *Haemophilus influenzae, b*, vaccine on or after 15 months of age shall be required to have only one dose of any of the

- Haemophilus influenzae* conjugate vaccines, including PRP-D. However, no individual who has passed their fifth birthday shall be required to be vaccinated against *Haemophilus influenzae, b*.
- (7) Hepatitis B vaccine--three doses: one dose by age three months, a second dose before age five months and a third dose by age 19 months. Individuals born before July 1, 1994 shall not be required to be vaccinated against hepatitis B.

*History Note: Authority G.S. 130A-152(c); 130A-155.1; Eff. February 1, 1976; Amended Eff. July 1, 1977; Readopted Eff. December 5, 1977; Filed as a Temporary Amendment Eff. February 1, 1988, for a period of 180 days to expire on July 29, 1988; Amended Eff. October 1, 1995; October 1, 1994; January 1, 1994; January 4, 1993; Filed as a Temporary Amendment Eff. May 21, 1999; Temporary Amendment Eff. February 23, 2000; August 20, 1999; Amended Eff. August 1, 2000; [Temporary Amendment Eff. August 1, 2001.](#)*

**TITLE 21 – OCCUPATIONAL LICENSING BOARDS**

**CHAPTER 18 – BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS**

**Rule-making Agency:** *State Board of Examiners of Electrical Contractors*

**Rule Citation:** *21 NCAC 18B .0204, .0206-.0210, .0404-.0405*

**Effective Date:** *August 31, 2001*

**Findings Reviewed and Approved by:** *Beecher R. Gray*

**Authority for the rulemaking:** *G.S. 87-42*

**Reason for Proposed Action:** *The North Carolina General Assembly enacted Senate Bill 396, which was ratified May 21, 2001 and approved by the Governor on May 31, 2001 and became Chapter 159 of the 2001 Session Laws. The General Assembly has mandated changes in fees for license renewal and for application and examination fees pursuant to Section 3 of the Act. The General Assembly has also granted authority to increase fees beyond those contained herein, but procedure for permanent rule-making would apply if the Board seeks to exercise such authority. The purpose of the temporary rule change is to eliminate confusion for licensees and provide for conformity between the mandate of the General Assembly and the rules of the Board. Because the fees have been set by the General Assembly until changed by permanent rule-making, the clarification of the rules has no adverse impact on licensees or the general public.*

**Comment Procedures:** *Comments may be provided to the Board in writing at PO Box 18727, Raleigh, NC 27619.*

**SUBCHAPTER 18B - BOARD'S RULES FOR THE  
IMPLEMENTATION OF THE ELECTRICAL  
CONTRACTING LICENSING ACT**

**SECTION .0200 – EXAMINATIONS**

**21 NCAC 18B .0204 EXAMINATIONS**

(a) All qualifying examinations administered by the Board for each license classification shall be written or computer-based examinations and must be taken personally by the respective applicant approved applicant, in his own handwriting.

(b) Approved applicants shall be provided a notice of examination eligibility that shall be valid for a period of six months and for a single administration of the qualifying examination. Upon receipt of a notice of examination eligibility from the Board, the applicant shall schedule the examination by contacting the Board or the authorized testing service in accordance with procedures established by the Board. The applicant will be scheduled for the examination and will be notified of the date, time and place.

*History Note: Authority G.S. 87-42; 87-43.3; 87-43.4;  
Eff. October 31, 1988;  
Temporary Amendment Eff. August 31, 2001.*

**21 NCAC 18B .0206 REGULAR EXAMINATIONS**

The executive director is authorized to arrange for regular ~~semi-annual~~ examinations to be held during the months of March and September of each year, administered by the Board or the Board's authorized computer testing service. The Board may establish such other dates as it deems necessary.

*History Note: Authority GS 87-42; 87-43.3; 87-43.4;  
Eff. October 1, 1988;  
Amended Eff. April 1, 1993;  
Temporary Amendment Eff. August 31, 2001.*

**21 NCAC 18B .0207 APPLICATION FOR REGULAR EXAMINATIONS**

(a) To be eligible for consideration, applications for regular ~~semi-annual~~ examinations must be filed with the Board not later than January 1 for the March semi-annual examination and not later than July 1 for the September semi-annual examination on a form furnished by the Board.

(b) The Board's staff shall determine whether or not applications are duly filed in accordance with Rule .0210 of this Section, ~~to~~ process all duly filed applications, and ~~to~~ return all applications not duly filed.

*History Note: Authority G.S. 87-42; 87-43.3; 87-43.4;  
Eff. October 1, 1988;  
Amended Eff. February 1, 1996;  
Temporary Amendment Eff. August 31, 2001.*

**21 NCAC 18B .0208 SPECIALLY ARRANGED EXAMINATIONS**

(a) Specially-arranged examinations are examinations given in the Board's office or elsewhere at a time other than during a regular ~~semi-annual~~ examination period.

(b) Provided the conditions of this Rule are met, the Board's staff may accept applications for specially-arranged examinations, to expedite verification of references and qualifications of applicants, and to arrange for such applicants to take a specially-arranged examination if the staff finds that a specially-arranged examination is justified. The Board shall consider and act on applications at the request of the application review committee or on written appeal of an applicant.

(c) An out-of-state electrical contractor shall mean a person, partnership, firm or corporation currently operating an electrical contracting business in accordance with the laws of his or its home state, outside the State of North Carolina. The Board shall give specially-arranged examinations on a reciprocal basis for out-of-state electrical contractors whose circumstances require that they be licensed prior to the time when a regular examination is scheduled and when such contractors are not eligible for a license pursuant to G.S. 87-50 because no reciprocal licensing agreement exists. An out-of-state electrical contractor's need to bid or otherwise offer to engage in a specific North Carolina project, the time-table for which will not permit waiting until the next ~~semi-annual~~ examination period, may constitute circumstances reasonably justifying the scheduling of a specially-arranged examination for the individual representing such out-of-state electrical contractor.

(1) To be eligible to take a specially-arranged examination, the individual applying to become qualified must file with the Board an application, together with the following:

(A) Information satisfactorily verifying that the out-of-state electrical contractor which the individual represents is engaged in a lawful electrical contracting business in its home state. If the out-of-state electrical contractor is required to be, and is, licensed in its home state as an electrical contractor, this information must include written verification that the licensing agency of such state will grant the same specially-arranged privilege to North Carolina electrical contractors.

(B) Information satisfactorily verifying the need for a North Carolina license prior to the next ~~semi-annual~~ examination period.

(C) The specially-arranged application-examination fee as prescribed in Rule .0209 of this Section.

(D) Information satisfactorily verifying that the applicant for the examination has met all the minimum requirements applicable to the classification involved as prescribed in Rules .0201, .0202 and .0210 of this Section.

(2) The Board's staff shall approve the application if the out-of-state electrical contractor is

required to be, and is, licensed in its home state as an electrical contractor and if the licensing agency in that state has committed itself in writing to grant to electrical contractors licensed by North Carolina the same privilege which the applicant is requesting from the Board.

- (3) The applicant shall take the examination for the classification of license involved, and at such special time and place as mutually agreed upon by the Board's staff and the applicant.
- (4) Specially-arranged examinations shall be graded promptly, and immediately thereafter the applicant shall be notified of the results. If the applicant passes, the out-of-state electrical contractor which he represents will be eligible to apply for a license based upon his qualifications and, upon meeting all of the other license requirements applicable to the license classification involved, as prescribed in Section .0400 of this Subchapter, a license shall be issued to the out-of-state electrical contractor with him indicated thereon as the qualified individual. If the applicant fails the examination, he will be required to wait the normally-required six-month waiting period between examinations before being eligible to take another specially-arranged examination. However, if he meets all of the other requirements and wishes to apply to take another specially-arranged examination in a classification lower than the classification of his failed examination, or to apply to take a regular examination during the next ~~semi-annual~~ examination period, the normally-required six-month waiting period shall not apply.

(d) A North Carolina electrical contractor shall mean a person, partnership, firm or corporation licensed by the Board to engage or offer to engage in the business of electrical contracting within the state of North Carolina. The Board shall give a specially-arranged examination for a North Carolina electrical contractor whose circumstances require that it be licensed in a classification higher than its current license prior to the time when a regular examination is scheduled. A North Carolina electrical contractor's need to bid or otherwise offer to engage in a specific electrical contracting project having a value exceeding the limitations of such contractor's current license, the time-table for which will not permit waiting until the next regular ~~semi-annual~~ examination period, may constitute circumstances reasonably justifying the scheduling of a specially-arranged examination for the individual representing such North Carolina electrical contractor.

- (1) To be eligible to take a specially-arranged examination, the individual applying to become qualified must file with the Board an application, together with the following:
  - (A) Information satisfactorily verifying the need to have the license upgraded prior to the next regular ~~semi-annual~~ examination period.

- (B) The specially-arranged application-examination fee as prescribed in Rule .0209 of this Section.
- (C) Information satisfactorily verifying that the applicant for the examination has met all the minimum requirements applicable to the classification involved as prescribed in Rules .0201, .0202 and .0210 of this Section.

- (2) When an application for a specially-arranged examination is received, the Board's staff shall determine if the applicant is the duly authorized representative of an electrical contractor licensed by the Board and, if so, shall approve the application.
- (3) The applicant shall take the examination for the classification of license involved, at such time and place as mutually agreed upon by the Board's staff and the applicant.
- (4) Specially-arranged examinations shall be graded promptly, and immediately thereafter the applicant shall be notified of the results. If the applicant passes, the electrical contractor which he represents will be eligible to apply to have its license upgraded based upon the passing applicant's qualification and, upon meeting all of the other license requirements applicable to the license classification involved, as prescribed in Section .0400 of this Subchapter, a new license shall be issued to the electrical contractor with him indicated thereon as the qualified individual. If the applicant fails the examination, he will be required to wait the normally-required six-month waiting period between examinations before being eligible to take another specially-arranged examination. However, if he meets all of the other requirements and wishes to apply to take another specially-arranged examination in a classification lower than the classification of his failed examination, or to apply to take a regular examination during the next ~~semi-annual~~ examination period, the normally-required six-month waiting period shall not apply.

(e) For the purposes of this Subsection, the loss of a listed qualified individual shall mean a currently-licensed electrical contractor being left without a listed qualified individual regularly on active duty in its electrical contracting principal or separate place of business. The Board shall give a specially-arranged examination for an electrical contractor which has lost its listed qualified individual to have another representative take a specially-arranged examination for the purposes of maintaining continuity of such electrical contractor's business. To be eligible to take a specially-arranged examination, the individual applying to become qualified must file with the Board an application, together with the following:

- (1) Information satisfactorily verifying the electrical contractor's need for a representative to take a specially-arranged examination

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- before the next regular ~~semi-annual~~ examination period.
- (2) The specially-arranged application-examination fee as prescribed in Rule .0209 of this Section.
- (3) Information satisfactorily verifying that the applicant for the examination has met all the minimum requirements applicable to the classification involved as prescribed in Rules .0201, .0202 and .0210 of this Section.

*Eff. October 1, 1988;*  
*Amended Eff. August 1, 1999; February 1, 1990;*  
Temporary Amendment Eff. August 31, 2001.

**21 NCAC 18B .0209 FEES**

(a) The ~~combined application and examination fees fee~~ for the regular qualifying examinations is seventy-five dollars (\$75.00) for all classifications. in the various license classifications are as follows:

*History Note: Authority G.S. 87-42; 87-43.3; 87-43.4; 87-44;*

**APPLICATION AND EXAMINATION FEE SCHEDULE:REGULAR**

CLASSIFICATION	APPLICATION	EXAMINATION	TOTAL
	FEE	FEE	COMBINED FEE
Limited	\$15.00	\$15.00	\$30.00
Intermediate	\$30.00	\$45.00	\$75.00
Unlimited	\$65.00	\$85.00	\$150.00
SP-SFD	\$15.00	\$1500	\$30.00
Special Restricted	\$15.00	\$1500	\$30.00

(b) The ~~combined application and examination fees fee~~ for a specially-arranged qualifying examination is two-hundred dollars (\$200.00) for all classifications. in the various license classifications are as follows:

**APPLICATION AND EXAMINATION FEE SCHEDULE:  
SPECIALLY ARRANGED**

CLASSIFICATION	APPLICATION	EXAMINATION	TOTAL
	FEE	FEE	COMBINED FEE
All Classifications	\$100.00	\$100.00	\$200.00

(c) The fee for a supervised review of a failed examination with the Board or staff assistance is ~~ten dollars (\$10.00)~~ twenty-five dollars (\$25.00) for all classifications.

(d) The ~~total combined application and examination fees~~ for regular or specially-arranged examinations in all classifications and the fees for examination reviews may be in the form of cash, check, check or money order order, Visa or Mastercard made payable to the Board and must accompany the respective applications when filed with the Board.

(e) ~~Application and examination~~ Examination fees received with applications filed for qualifying examinations shall be retained by the Board unless:

- (1) an application is not duly filed as prescribed in Rule .0210 of this Section, in which case the ~~combined application and examination fee~~ shall be returned; or
- (2) the applicant does not take the examination during the examination period applied for and files with the Board a written request for a refund, setting out extenuating circumstances. The Board shall refund ~~the application fee, the examination fee, or both,~~ if it finds extenuating circumstances.

(f) Examination review fees are non-refundable unless the applicant does not take the review and files with the Board a written request for a refund, setting out extenuating

circumstance. The Board shall refund the fee if it finds extenuating circumstances.

(g) Any fee retained by the Board shall not be creditable toward the payment of any future application of examination fee or the fee for an examination review.

(h) Extenuating circumstances for the purposes of Paragraphs (e)(2) and (f) of this Rule shall be the applicant's illness, bodily injury or death, or death of the applicant's spouse, child, parent or sibling, or a breakdown of the applicant's transportation to the designated site of the examination or examination review.

*History Note: Authority G.S. 87-42; 87-43.3; 87-43.4; 87-44;*

*Eff. October 1, 1988;*  
*Amended Eff. May 1, 1998; July 1, 1989;*  
*Temporary Amendment Eff. June 30, 2000;*  
Temporary Amendment Eff. August 31, 2001.

**21 NCAC 18B .0210 APPLICATIONS DULY FILED**

Examinations applications shall be considered as duly filed when the applicant has, has, on or before the filing cut-off date, filed an application with the Board, on a form provided by the Board, together with the ~~combined application~~ examination fee for the classification involved as prescribed in Rule .0209 of this Section and information sufficient to establish satisfactorily verifying that he meets all of the minimum examination

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requirements applicable to the classification involved. By filing his application with the Board an applicant authorizes the Board or the Board's staff to verify, in any manner the Board or staff deems necessary and appropriate, the information submitted on or in support of his application.

*History Note:* Authority G.S. 87-42; 87-43.3; 87-43.4; 87-44;

*Eff. October 1, 1988;*

*Temporary Amendment Eff. August 31, 2001.*

**SECTION .0400 – LICENSING REQUIREMENTS**

**21 NCAC 18B .0404 ANNUAL LICENSE FEES**

(a) The annual license fees and license renewal fees for the various license classifications are as follows:

CLASSIFICATION	LICENSE FEE SCHEDULE	LICENSE FEE
Limited		\$ <del>30.00</del> 60.00
Intermediate		\$ <del>75.00</del> 100.00
Unlimited		\$150.00
SP-SFD		\$ <del>30.00</del> 60.00
Special Restricted		\$ <del>30.00</del> 60.00

(b) License fees may be in the form of cash, ~~check~~ ~~check or any money order~~ order, Visa or Mastercard made payable to the Board and must accompany the applicant's license application or license renewal application when either is filed with the Board.

*History Note:* Authority G.S. 87-42; 87-44;  
*Eff. October 1, 1988;*  
*Amended Eff. May 1, 1998; July 1, 1989;*  
*Temporary Amendment Eff. June 30, 2000;*  
*Temporary Amendment Eff. August 31, 2001.*

(b) The Board will implement a system of staggered license renewals beginning July 1, 2002. Renewal applications for the year beginning July 1, 2002 will be mailed in the spring of 2002. Some licenses will be renewed for a 13-month period and the fee for such licenses will be the license fee set forth in Rule .0404 of this Section together with a one-twelfth (1/12) pro rata part of the license fee. Other renewals will be for varying monthly terms up to 23 months and pro rata portions of the license fee for that classification will be added. Beginning July 1, 2003 all licenses will be renewed for 12 month periods as the renewal date is reached.

**21 NCAC 18B .0405 LICENSE RENEWAL DUE DATE**

(a) License renewal applications and fees are due ~~on June 1, 30 days prior to the license expiration date, and a penalty. An administrative fee~~ of twenty-five dollars (\$25.00) shall be imposed upon applications received after ~~June 30, the expiration date~~. Applications filed with the Board by mail shall be considered filed on the date such mail is postmarked.

*History Note:* Authority G.S. 87-42; 87-44;  
*Eff. October 1, 1988;*  
*Amended Eff. February 1, 1990;*  
*Temporary Amendment Eff. August 31, 2001.*

**APPROVED RULES**

*This Section includes the Register Notice citation to Rules approved by the Rules Review Commission (RRC) at its meeting of July 19, 2001 pursuant to G.S. 150B-21.17(a)(1) and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules is published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an \* in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

*These rules, unless otherwise noted, will become effective on the 31st legislative day of the 2001 Session of the General Assembly or a later date if specified by the agency unless a bill is introduced before the 31st legislative day that specifically disapproves the rule. If a bill to disapprove a rule is not ratified, the rule will become effective either on the day the bill receives an unfavorable final action or the day the General Assembly adjourns. Statutory reference: G.S. 150B-21.3.*

<b>APPROVED RULE CITATION</b>				<b>REGISTER CITATION TO THE NOTICE OF TEXT</b>
10	NCAC	41H	.0405*	15:21 NCR
10	NCAC	41H	.0406-.0408	15:21 NCR
12	NCAC	09A	.0204-.0205*	not required G.S. 150B-21.5, Eff. August 1, 2001
12	NCAC	09B	.0108*	not required G.S. 150B-21.5, Eff. August 1, 2001
12	NCAC	09B	.0234*	not required G.S. 150B-21.5, Eff. August 1, 2001
12	NCAC	09C	.0208*	not required G.S. 150B-21.5, Eff. August 1, 2001
15A	NCAC	06G	.0101-.0103*	15:12 NCR
15A	NCAC	06G	.0104	15:12 NCR
15A	NCAC	06G	.0105*	15:12 NCR
15A	NCAC	06G	.0106	15:12 NCR
15A	NCAC	18A	.3307*	15:13 NCR
15A	NCAC	18A	.3313*	15:13 NCR
15A	NCAC	18A	.3319*	15:13 NCR
15A	NCAC	18A	.3323-.3324*	15:13 NCR
15A	NCAC	18A	.3327*	15:13 NCR
15A	NCAC	18A	.3330-.3331*	15:13 NCR
16	NCAC	06D	.0502	15:20 NCR, Eff. August 1, 2001
16	NCAC	06H	.0111	15:18 NCR
19A	NCAC	02D	.1003*	15:19 NCR
21	NCAC	17	.0101*	15:10 NCR
21	NCAC	17	.0104-.0105*	15:10 NCR
21	NCAC	17	.0107*	15:10 NCR
21	NCAC	17	.0109*	15:10 NCR
21	NCAC	17	.0114*	15:10 NCR
21	NCAC	17	.0115	15:10 NCR
21	NCAC	17	.0116*	15:10 NCR
21	NCAC	17	.0302-.0304*	15:10 NCR
21	NCAC	36	.0405*	15:19 NCR
21	NCAC	48A	.0103*	15:18 NCR
21	NCAC	48B	.0103	15:18 NCR
21	NCAC	48C	.0101*	15:18 NCR
21	NCAC	48C	.0201	15:18 NCR
21	NCAC	48C	.0402*	15:18 NCR
21	NCAC	48C	.0601*	15:18 NCR
21	NCAC	48D	.0107*	15:18 NCR
21	NCAC	48F	.0102*	15:18 NCR
21	NCAC	48F	.0105*	15:18 NCR
21	NCAC	48G	.0202*	15:18 NCR
21	NCAC	48G	.0402-.0403*	15:18 NCR
21	NCAC	48G	.0512*	15:18 NCR
21	NCAC	48G	.0517*	15:18 NCR
21	NCAC	48G	.0601	15:18 NCR

**TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**10 NCAC 41H .0405 ADOPTION ASSISTANCE DEFINED**

- (a) Regular monthly cash assistance payments means the graduated rates set by the General Assembly. The payments may be made to children who meet the requirements set out in Rule .0407 of this Section.
- (b) Vendor payments are made directly to the provider, including adoptive parents, for medical services not covered by Medicaid, therapeutic, psychological, and remedial services for children who meet the eligibility criteria set out in Rule .0407 of this Section.
- (c) Special Children Adoption Incentive Fund payments may be made to children who meet the requirements as set out in Rule .0409 of this Section.

*History Note: Authority G.S. 108A-49; 108A-50; 143B-153; Eff. July 1, 1982; Amended Eff. July 17, 2002; July 1, 1991; September 1, 1986.*

**TITLE 12 - DEPARTMENT OF JUSTICE**

**12 NCAC 09A .0204 SUSPENSION: REVOCATION: OR DENIAL OF CERTIFICATION**

- (a) The Commission shall revoke the certification of a criminal justice officer when the Commission finds that the officer has committed or been convicted of:
  - (1) a felony offense; or
  - (2) a criminal offense for which the authorized punishment included imprisonment for more than two years.
- (b) The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:
  - (1) has not enrolled in and satisfactorily completed the required basic training course in its entirety within prescribed time periods relevant or applicable to a specified position or job title;
  - (2) fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B .0100 for the category of the officer's certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 09B .0200 or 12 NCAC 09B .0400 for the category of the officer's certification;
  - (3) has committed or been convicted of:
    - (A) a criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B misdemeanor; or
    - (B) four or more criminal offenses or unlawful acts defined in 12 NCAC 09A .0103 as a Class A misdemeanor, each of which occurred after the date of initial certification;
  - (4) has been discharged by a criminal justice agency for commission or conviction of:

- (A) a motor vehicle offense requiring the revocation of the officer's driver's license; or
- (B) any other offense involving moral turpitude;
- (5) has been discharged by a criminal justice agency because the officer lacks the mental or physical capabilities to properly fulfill the responsibilities of a criminal justice officer;
- (6) has knowingly made a material misrepresentation of any information required for certification or accreditation;
- (7) has knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission;
- (8) has knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, aided another person in obtaining or attempting to obtain credit, training or certification from the Commission;
- (9) has failed to make either of the notifications as required by 12 NCAC 09B .0101(8);
- (10) has been removed from office by decree of the Superior Court in accord with the provisions of G.S. 128-16 or has been removed from office by sentence of the court in accord with the provisions of G.S. 14-230;
- (11) fails to satisfactorily complete the minimum in-service training requirements as prescribed in 12 NCAC 09E;
- (12) has refused to submit to an applicant or lateral transferee drug screen as required by these Rules;
- (13) has produced a positive result on a drug screen reported to the Commission as specified in 12 NCAC 09C .0310, where the positive result cannot be explained to the Commission's satisfaction; or
- (14) has been denied certification or had such justice officer certification suspended or revoked by the North Carolina Sheriffs' Education and Training Standards Commission.

(c) Following suspension, revocation, or denial of the person's certification, the person may not remain employed or appointed as a criminal justice officer and the person may not exercise any authority of a criminal justice officer during a period for which the person's certification is suspended, revoked, or denied.

*History Note: Authority G.S. 17C-6; 17C-10; Eff. January 1, 1981; Amended Eff. August 1, 2001; August 1, 1995; November 1, 1993; March 1, 1992; July 1, 1990.*

**12 NCAC 09A .0205 PERIOD OF SUSPENSION: REVOCATION: OR DENIAL**

(a) When the Commission revokes or denies the certification of a criminal justice officer, the period of the sanction shall be permanent where the cause of sanction is:

- (1) commission or conviction of a felony offense; or
- (2) commission or conviction of a criminal offense for which authorized punishment included imprisonment for more than two years; or
- (3) the second suspension of an officer's certification for any of the causes requiring a five-year period of suspension.

(b) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is:

- (1) commission or conviction of a criminal offense other than those listed in Paragraph (a) of this Rule; or
- (2) refusal to submit to the applicant or lateral transferee drug screen required by these Rules; or
- (3) production of a positive result on a drug screen reported to the Commission under 12 NCAC 09C .0310, where the positive result cannot be explained to the Commission's satisfaction; or
- (4) material misrepresentation of any information required for certification or accreditation; or
- (5) obtaining, attempting to obtain, aiding another person to obtain, or aiding another person attempt to obtain credit, training or certification by any means of false pretense, deception, fraud, misrepresentation or cheating; or
- (6) failure to make either of the notifications as required by 12 NCAC 09B .0101(8); or
- (7) removal from office under the provisions of G.S. 128-16 or the provisions of G.S. 14-230.

(c) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:

- (1) failure to meet or satisfy relevant basic training requirements; or
- (2) failure to meet or maintain the minimum standards of employment; or
- (3) discharge from a criminal justice agency for impairment of physical or mental capabilities; or
- (4) failure to meet or satisfy the in-service training requirements as prescribed in 12 NCAC 9E.

*History Note: Authority G.S. 17C-6; 17C-10; Eff. January 1, 1981; Amended Eff. August 1, 2001; November 1, 1993; July 1, 1990; July 1, 1989; October 1, 1985.*

**12 NCAC 09B .0108 MINIMUM STANDARDS FOR STATE YOUTH SERVICES OFFICERS**

In addition to the requirements for criminal justice officers contained in Rule .0101 of the Section, every state youth services officer employed by the Department of Juvenile Justice and Delinquency Prevention shall:

- (1) not have committed or been convicted of:
  - (a) a felony; or
  - (b) a crime for which the punishment could have been imprisonment for more than two years; or
  - (c) a crime or unlawful act defined as a "Class B misdemeanor" within the five year period prior to the date of application for employment; or
  - (d) four or more crimes or unlawful acts defined as "Class B misdemeanors" regardless of the date of conviction; or
  - (e) four or more crimes or unlawful acts defined as "Class A misdemeanors" except the applicant may be employed if the last conviction occurred more than two years prior to the date of application for employment;
- (2) have attained the associate degree or have satisfactorily completed at least 60 semester hours or 90 quarter hours of educational credit at a technical institute, community college, junior college, college, or university recognized by the United States Department of Education and the Council of Higher Education Accreditation; and
- (3) in lieu of the educational requirements of Paragraph (2) of this Rule, persons employed as "Cottage Parent I," "Cottage Parent II," "Cottage Life Counselor Technician", or "Youth Services Behavioral Technician" shall have graduated from high school or have successfully completed the General Education Development Test indicating high school equivalency.

*History Note: Authority G.S. 17C-6; Eff. January 1, 1981; Amended Eff. August 1, 2001; December 1, 1987; October 1, 1985; July 1, 1983; January 1, 1983.*

**12 NCAC 09B .0234 BASIC TRAINING -- JUVENILE DETENTION HOMES PERSONNEL**

(a) The basic training course for local confinement personnel who work in juvenile detention homes, either state or local, shall consist of a minimum of 72 hours of instruction presented during a single course offering not to exceed two weeks in length.

(b) The basic training course for juvenile detention home officers shall include training in the following identified topical areas:

- |                                     |          |
|-------------------------------------|----------|
| (1) Course Orientation              | 2 Hours  |
| (2) Juvenile Law                    | 4 Hours  |
| (3) Introduction to Reality Therapy | 24 Hours |

- |     |  |          |
|-----|--|----------|
| (4) | Suicide Prevention                               | 4 Hours  |
| (5) | Daily Supervision in a Juvenile Detention Center | 6 Hours  |
| (6) | Unarmed Self-Defense                             | 20 Hours |
| (7) | Standard First Aid                               | 8 Hours  |
| (8) | Evaluation and Testing                           | 2 Hours  |
| (9) | Prevention of Communicable Diseases              | 2 Hours  |

(c) The Commission-accredited school that is accredited to offer the "Basic Training--Juvenile Detention" course is: The Department of Juvenile Justice and Delinquency Prevention.

*History Note: Authority G.S. 17C-2; 17C-6; 17C-10; Eff. March 1, 1990; Amended Eff. August 1, 2001.*

**12 NCAC 09C .0208 REPORT OF SEPARATION**

The Report of Separation, is used for reporting the date of and reason for the separation of a criminal justice officer from the employing agency.

*History Note: Authority G.S. 17C-6; 150B-11; Eff. January 1, 1981; Temporary Amendment Eff. January 1, 2001; Amended Eff. August 1, 2001.*

(d) The applicable standards, rules, regulations, and practices of the Natural Resource Conservation Service (NRCS) NRCS Field Office Technical Guide, the Farm Service Agency (FSA) 2-CRP Manual, the Division of Forest Resources, 15A NCAC 09C .0400 and the Wetlands Restoration Program, G.S. 143-214.8 are incorporated herein by reference, and such incorporation includes subsequent amendments and editions of the referenced material. Likewise, the provisions of the United States Department of Agriculture's 2CRP Manual are incorporated herein by reference, and such incorporation includes subsequent amendments and editions of the referenced material. Copies of all of these materials are available at the offices of the Division, and the cost of any copies may not exceed ten cents (\$.10) per page.

*History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000; Eff. August 1, 2002.*

**15A NCAC 06G .0102 ELIGIBILITY**

(a) Persons may offer to enroll acreage to CREP at any time within the 5-year enrollment period or any extension thereof. Acreage enrolled into the CREP is referred to as "CREP Enrollments." Acreage enrolled into NC-CREP is referred to as NC-CREP 3 Enrollments. In order to be enrolled into the CREP, all of the following must be met:

- (1) Applicant meets the producer eligibility requirements within the 2-CRP Manual;
- (2) Acreage offered meets the cropland and marginal pasture land requirements within the 2-CRP Manual;
- (3) Acreage offered is eligible under the 2-CRP Manual, and applicable NRCS standards, and is suitable for the intended practice; and
- (4) Producer accepts the maximum payment rate based on one of the following:
  - (A) the county average rental for enrollments of less than 10 acres; or
  - (B) the 3 predominant soil types for enrollments of 10 acres or greater; or
  - (C) marginal pastureland rental rate.

(b) In addition to meeting the requirements in Paragraph (a) of this Section, the land must meet all other applicable land eligibility criteria and enrollment expectations as set forth in the 2-CRP Manual. The Commission may refuse enrollment where water quality benefits do not justify the payments, or where the acquisition is impractical or nuisance conditions exist on the land.

(c) The following acreage is ineligible to be enrolled in CREP:

- (1) federally-owned land unless the applicant has a prior written lease for the time frame in which the land is under the Conservation Reserve Program (CRP);
- (2) land on which a federal agency restricts the use in a mortgage or an easement;
- (3) acreage permanently under water, including acreage currently enrolled in CRP;
- (4) land currently enrolled in other federal programs and still under lifespan requirements;

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**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

**15A NCAC 06G .0101 OBJECTIVES**

(a) The North Carolina Conservation Reserve Enhancement Program (CREP) is a state/federal/local partnership that combines existing federal Conservation Reserve Program (CRP) funding and state funding from various sources, including the Agriculture Cost Share Program (ACSP), to take environmentally sensitive land out of crop production. For purposes of this Rule the generic term "CREP" references either the federal portion or the combined federal and state portions of the program. The combined federal and state portion of CREP is referred to as NC-CREP. Under CREP, landowners may voluntarily enroll eligible land in 10-year, 15-year, 30-year or permanent agreements or contracts. The Commission operates the state portion of NC CREP program as the lead agency for the State of North Carolina (State), and may from time to time delegate activities to the Division.

(b) The program objectives for the Commission, which are the same as those of the multi-agency CREP team, are the following: to reduce agricultural non-point source pollution; to enroll eligible land in 10-year, 15-year, 30-year or permanent contracts; to encourage voluntary sign-ups for the program; and to enhance ecological aspects and wildlife habitat of areas near watercourses.

(c) There will initially be an enrollment period beginning March 1, 1999, which will last five years, unless otherwise extended during which time requests to enroll acreage will be received. The Division, or its agent, will seek eligible applicants for enrollment into the program. Landowner payments will be made in accordance with state and federal requirements, and are subject to the availability of funds.

- (5) land already enrolled in CRP; or
- (6) acreage withdrawn, terminated or otherwise released from the CRP after enrollment and before the contract expiration date.

(d) Eligibility for the CREP shall be determined by the local District, Farm Service Agency (FSA), NRCS and the Division. An eligible applicant may enter into the federal agreements (10-years to 15-years), as well as the State agreements (30-year or permanent). Persons and land qualifying for the federal portion of CREP may also be qualified for enrollment under NC-CREP. Any landowner enrolling 10 acres or greater per tract, regardless of the length of enrollment, must enter into a 30-year or permanent State agreement. 30-year or permanent State agreements also require granting of a conservation easement to the State.

*History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000; Eff. August 1, 2002.*

**15A NCAC 06G .0103 CONSERVATION PLAN**

(a) A conservation plan is required for all CREP Enrollments. The conservation plan is a record of the applicant's decisions and supporting information for the treatment of a unit of land or water as a result of the planning process that meets the NRCS Field Office Technical Guide quality criteria for each natural resource and that addresses economic and social considerations. The plan shall describe the schedule of operations and activities required to solve identified natural resource concerns. Conservation plans shall be prepared according to all applicable federal, state and local environmental laws, executive orders, and rules. The conservation plan shall be consistent with any conservation easement protecting the enrollment area. This applies regardless of eligibility for cost-share funds. Participants shall also agree to establish and maintain approved practices according to the conservation plan of operations and forest management plans, for the duration of the agreement. Practices included in the conservation plan must cost-effectively achieve a reduction in soil erosion and nutrient transport. All forestry management practices must be completed according to a forestry management plan approved by a registered forester. The Division and the Commission may review conservation plans at any time while CREP agreements are effective.

(b) All CREP Enrollments must provide interception of water from the crop or pasture land into the enrollment area. All CREP Enrollments must maintain a contiguous buffer with the water course. Enrollments of wetland restoration areas shall only be accepted if lands are hydrologically restored to the greatest extent practicable and, if enrollments shall be in trees, in those areas where trees would be the natural cover. The riparian forested buffer or wetland practice may include an outer buffer layer of native grasses between cropped areas and the trees, as specified in the practice criteria. Hydrologic restoration to the greatest extent practicable shall occur on all NC-CREP Enrollments. Hydrologic restoration to the greatest extent practicable means to improve/increase hydrology and/or retain water to the maximum extent as long as there are no adverse impacts to non-enrolled lands. This will be accomplished through the following means: creating sheet flow; reducing concentrated flow areas; blocking or filling artificial drainage; or

using water control structures in conjunction with buffers. All shall meet or exceed appropriate NRCS standards. Water infiltration and retention should be maximized on non-hydric soils by creating sheet flow and by reducing concentrated flow areas. Plans should provide for improved wildlife habitat. The establishment of CREP practices shall be:

- (1) consistent with conservation compliance provisions;
- (2) at the participant's own expense;
- (3) included in the approved conservation plan;
- (4) approved by the local District; and
- (5) subject to FSA and Division approval where applicable.

(d) A modification to an approved conservation plan must be in the best interest of CREP, and consistent with any conservation easement protecting the enrollment area. Such plans should be revised on an as-needed basis. Acceptable modifications include but are not limited to:

- (1) adding or improving a CREP practice;
- (2) changing CREP practices;
- (3) scheduling reapplication of a CREP practice;
- (4) reflecting change in ownership; or
- (5) implementing other non-cost shared conservation measures, if producer agrees to install according to the approved conservation plan on CREP land already seeded to an acceptable cover.

*History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000; Eff. August 1, 2002.*

**15A NCAC 06G .0105 PAYMENT**

(a) The NC-CREP combines federal and state funding to achieve the goals of the program. For that reason, the eligible person may receive two separate payments (i.e. federal and state) to meet expectations set by the applicable contracts.

(b) The State payment shall be dependent on the length of the contract signed. The State payment will consist of a one-time bonus payment for executed contracts for 30-year and permanent enrollments, which require a conservation easement. The State shall also pay a portion of cost-sharable practices implemented within the guidelines of the ACSP subject to availability of funds to the District. Any agricultural cost share payments will be consistent with all Commission requirements, including but not limited to those in 15A NCAC 06E .0101-.0108.

(c) For enrollments involving the ACSP, all cost-share practices are subject to terms and policies as set forth in the ACSP rules and best management practices manual. State cost-share percentages, listed below, shall be dependent on the length of enrollment. All payments involving ACSP funds require approval of the local District Board of Supervisors, and are subject to the availability of funds to the District.

10 year	25%
15 year	30%
30 year	40%
permanent agreement	50%

(d) The maximum one-time bonus payment under NC-CREP that an eligible person can receive will be limited by the maximum payment allowed under the federal payment. The

payment for enrollment of land in 30-year or permanent conservation easements will be made once the conservation easement has been recorded by the State and it has been determined that the participant is actively engaged in the applicable practices.

(e) The formula for payment of the one-time State bonus will be as follows on a per acre basis:

-permanent agreement bonus payment = (15 x federal payment) x 0.30  
 -30-year agreement bonus payment = (15 x federal payment) x 0.125

(f) An additional payment of one hundred dollars (\$100.00) per contract will be made to a participant for applying tree-planting practices on land enrolled in a 15-year, 30-year or permanent agreement, if consistent with the provisions of the 2-CRP Manual.

*History Note: Authority G.S. 113A-235; 139-4; 143-215.74(a); 143B-294; S.L. 1998-165; Temporary Adoption Eff. October 1, 2000; Eff. August 1, 2002.*

**15A NCAC 18A .3307 FOOD PREPARATION**

(a) Food shall be prepared with the least possible manual contact, with utensils, and on surfaces that have been cleaned, rinsed, and sanitized prior to use in order to prevent cross-contamination.

(b) Whenever there is a change in processing from raw to ready-to-eat foods, the new operation shall begin with food-contact surfaces and utensils which are clean and sanitized.

(c) Raw fruits and raw vegetables shall be thoroughly washed with potable water before being cooked or served.

(d) Potentially hazardous foods requiring cooking shall be cooked to heat all parts of the food to a temperature of at least 140°F (60°C), except that:

- (1) Poultry, poultry stuffings, stuffed meats and stuffings containing meat shall be cooked to heat all parts of the food to at least 165°F (74°C) with no interruption of the cooking process;
- (2) Pork and any food containing pork shall be cooked to heat all parts of the food to at least 155°F (68°C) for 15 seconds with no interruption in the cooking process;
- (3) Ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155°F (68°C) with no interruption in the cooking process;
- (4) Rare roast beef shall be cooked to an internal temperature of at least 130°F (54°C) with no interruption in the cooking process.

(e) Raw animal products cooked in a microwave oven shall be rotated during cooking to compensate for uneven heat distribution.

(f) Potentially hazardous foods that have been cooked and then refrigerated, if served above 45°F (7°C), shall be reheated rapidly to an internal temperature of 165°F (74°C) or higher before being served or before being placed in a hot food storage unit except that, food in intact manufacturer's heat-and-serve packages may initially be reheated to 140°F (60°C). Steam tables, warmers, and similar hot food holding units are prohibited for the rapid reheating of potentially hazardous foods

unless the equipment was specifically designed to rapidly reheat foods to 165°F.

(g) A food temperature measuring device, accurate to ±2° F (±1°C), shall be provided and used to assure the attainment and maintenance of proper internal cooking, holding, or refrigeration temperatures of all potentially hazardous foods.

(h) Potentially hazardous foods shall be thawed:

- (1) In refrigerated units at a temperature not to exceed 45°F (7°C);
- (2) Under potable running water of a temperature of 70°F (21°C) or below, with sufficient water velocity to agitate and float off loose food particles into the overflow;
- (3) In a microwave oven only when the food will be immediately transferred to conventional cooking equipment as part of a continuous cooking process or when the entire, uninterrupted cooking process takes place in the microwave oven; or
- (4) As part of the conventional cooking process.

*History Note: Authority G.S. 130A-235; Eff. August 1, 2002.*

**15A NCAC 18A .3313 MECHANICAL CLEANING AND SANITIZING**

(a) Machine or water line mounted numerically scaled indicating thermometers, accurate to ±3°F (± 1.5°C), shall be provided for commercial dishwashing equipment to indicate the temperature of the water in each tank of the machine and the temperature of the final rinse water as it enters the manifold.

(b) Drainboards or counter top space of adequate size for the proper handling of soiled utensils prior to washing and cleaned utensils following sanitization shall be provided.

(c) Equipment and utensils shall be flushed or scraped and, when necessary, soaked to remove large food particles and soil prior to being washed in a dishwashing machine unless a prewash cycle is a part of the dishwashing machine operation. Equipment and utensils shall be placed in racks, trays, or baskets, or on conveyors, in a way that food-contact surfaces are exposed to the unobstructed application of detergent wash and clean rinse waters and that permits free draining.

(d) Machines using chemicals for sanitization may be used provided that a testing method or equipment is available, convenient, and used to test chemical sanitizers to insure minimum prescribed strengths.

(e) All dishwashing machines shall be thoroughly cleaned at least once a day or more often when necessary to maintain them in operating condition.

(f) After sanitization, all equipment and utensils shall be air dried.

*History Note: Authority G.S. 130A-235; Eff. August 1, 2002.*

**15A NCAC 18A .3319 CLOTHING AND CLOTHING CHANGING**

(a) Clothing changes shall be done in restrooms or other areas designated for that purpose.

(b) Clothing Changing surfaces shall be smooth, nonabsorbent, easily cleanable and shall be approved by the Department.

(c) Clothing Changing surfaces shall be kept free of storage and shall be cleaned with a mild solution of water and detergent and sanitized after each changing. A solution of 100 ppm chlorine or equivalent methods approved by the Department shall be used for sanitizing. A testing method or kit shall be available and used daily to measure sanitizer concentration and insure compliance with the minimum prescribed strength. These solutions shall be used from hand pump spray bottles which are labeled to identify the contents.

(d) Each clothing changing area shall include a handwash lavatory.

(e) The use of disposable gloves by caregivers during the clothing changing process is required if the worker has cuts or sores on hands or chapped hands. Gloves shall be discarded after use.

(f) Caregivers may dispose of feces in the toilet, and soiled clothing shall be placed in a tightly closed plastic bag or other equivalent container approved by the Department and sent daily to the participant's home or a laundry area to be laundered. Clothing shall not be rinsed except where a utility sink is provided for that purpose.

(g) Only pre-moistened towelettes or paper towels shall be used for cleaning participants during the changing process. Soiled paper or towelettes shall be discarded after use in a covered plastic-lined receptacle.

(h) Soiled disposable diapers shall be placed in a cleanable, plastic-lined, covered container and removed to an exterior garbage area at least daily.

(i) Whether or not disposable gloves are used, caregivers shall wash their hands after each individual clothing change in accordance with Rule .3328 of this Section.

(j) Participant's hands shall be washed in the lavatory after each individual clothing change in accordance with Rule .3328 of this Section.

*History Note: Authority G.S. 130A-235;  
Eff. August 1, 2002.*

**15A NCAC 18A .3323 PERSONNEL**

(a) Employees shall wear clean outer clothing and shall be clean as to their person and methods of foodhandling and participant care. Employees shall keep their fingernails clean and trimmed.

(b) Hair nets, caps, or similar hair restraints shall be worn by employees engaged in the preparation or service of food. Hair spray, barrettes, or visors are not considered an effective hair restraint.

(c) Tobacco use in any form is prohibited in the food preparation area. Smoking shall be prohibited in building areas occupied by non-smokers.

(d) Persons with a communicable disease or a communicable condition shall be excluded from situations in which transmission can be reasonably expected to occur, in accordance with Communicable Disease Control Measures under 15A NCAC 19A .0200. Any person with boils, sores, burns, infected wounds or other potentially draining lesions on the face, neck, hands, lower arms or other exposed skin shall bandage affected area to eliminate exposure to drainage. If exposure to drainage cannot be eliminated or proper handwashing cannot be maintained, then the employee shall be excluded from the adult day service facility while the condition exists.

(e) Volunteer personnel shall adhere to the same requirements in these Rules as employees.

*History Note: Authority G.S. 130A-235;  
Eff. August 1, 2002.*

**15A NCAC 18A .3324 FLOORS**

(a) Floors and floor coverings of all food preparation, food storage, utensil-washing areas, toilet rooms, maintenance rooms, utility rooms, and laundry areas shall be constructed of nonabsorbent, easily cleanable, durable material such as sealed concrete, terrazzo, ceramic tile, durable grades of linoleum or plastic, or tight wood impregnated with plastic.

(b) Carpeting used as a floor covering shall be of closely woven construction, installed to prevent hazards or obstacles to cleaning, and easily cleanable. Carpeting is prohibited in food preparation areas, equipment and utensil-washing areas, food storage areas, laundry areas, and toilet rooms.

(c) All floors shall be kept clean and maintained in good repair. Carpeting shall be kept clean and dry.

*History Note: Authority G.S. 130A-235;  
Eff. August 1, 2002.*

**15A NCAC 18A .3327 COMMUNICABLE DISEASES AND CONDITIONS**

(a) Any person who becomes ill at the adult day service facility and is suspected of having a communicable disease or communicable condition shall be separated from the other participants until leaving the facility.

(b) Each adult day service facility shall include a designated area for a person who becomes ill. When in use, such area shall be equipped with a bed, cot or mat and a vomitus receptacle. All materials shall be sanitized after each use. Linens and disposables shall be changed after each use.

(c) If the area is not a separate room, it shall be separated from space used by other participants by a partition, screen or other means approved by the Environmental Health Specialist to minimize exposure of other participants to a person who is ill. This designated area shall be proximate to a toilet and lavatory, and where health and sanitation measures can be carried out without interrupting activities of other participants and staff. Ill people shall not be allowed in areas where food is prepared or handled.

(d) Facilities providing adult day health services shall have a treatment room which is separate from areas used for storage and handling of food. The treatment room shall have a hand sink or have a doorway which connects it to a room containing a sink.

*History Note: Authority G.S. 130A-235;  
Eff. August 1, 2002.*

**15A NCAC 18A .3330 SOLID WASTES**

(a) Solid wastes containing food scraps or other putrescible materials shall, prior to disposal, be kept in durable, rust-resistant, nonabsorbent, water-tight, rodent-proof, and easily cleanable containers such as standard garbage cans which shall be covered with tight lids when filled or stored or not in continuous use. Refuse including scrap paper, cardboard boxes

and similar items shall be stored in containers, rooms or designated areas approved by the Department.

(b) Facilities shall be provided for the washing and storage of all garbage cans and mops for adult day service facilities, except for facilities certified or licensed for fewer than 13 participants. Cleaning facilities shall include combination faucet, hot and cold running water, threaded nozzle, and curbed impervious pad sloped to drain into an approved sanitary sewage system.

(c) Where containerized systems are used for garbage storage, facilities shall be provided for the cleaning of such systems. A contract for off-site cleaning shall constitute compliance with this Section.

(d) Solid wastes shall be disposed of so as to prevent insect breeding and public health nuisances.

*History Note: Authority G.S. 130A-235; Eff. August 1, 2002.*

**15A NCAC 18A .3331 ANIMAL AND VERMIN CONTROL: PREMISES**

(a) Unrestrained animals, except those used in approved pet therapy programs and service animals accompanying persons with disabilities, shall not be allowed in the adult day service facility, including the outdoor area. Animals shall not be allowed in the food preparation areas. Animal cages, bedding, litter boxes and other pet-related items shall be kept clean.

(b) Effective measures shall be taken to keep insects, rodents, and other vermin out of the facility and to prevent their breeding or presence on the premises.

(c) All openings to the outer air shall be protected against the entrance of flying insects. For extermination of flying insects, only approved pyrethrin-based insecticides or a fly swatter shall be used in the food preparation areas. Products shall be used only in accordance with directions and cautions appearing on the manufacturers' labels. Insecticides shall not come in contact with raw or cooked food, utensils, or equipment used in food preparation and serving, or with any other food-contact surface.

(d) Only those pesticides which have been registered with the U.S. Environmental Protection Agency and the North Carolina Department of Agriculture and Consumer Services shall be used. Pesticides shall be used in accordance with the directions on the manufacturers' label and shall be stored in a locked storage room or cabinet separate from foods and medications.

*History Note: Authority G.S. 130A-235; Eff. August 1, 2002.*

**TITLE 19A – DEPARTMENT OF TRANSPORTATION**

**19A NCAC 02D .1003 PARTICIPATION IN THE PROGRAM**

(a) The adoption of a section of highway is a privilege in consideration for public service that may be granted by the Department to individuals or groups who would assist the Adopt-A-Highway Program in achieving its purpose.

(b) Only individuals or groups determined by the Department to exhibit in good faith the willingness and the capacity to perform the responsibilities of the Program will be allowed to adopt a highway. The Department may refuse to grant a request to adopt a section of highway if, in its opinion, granting the request

would jeopardize the Program, be counterproductive to its purpose as set out in Rule 02D.1001 of this Section, or create a hazard to the safety of Department employees or the public. Highway safety is a principal concern in all decisions related to the Program. Program participants shall not be discriminated against on the basis of religion, race, national origin, sex or handicap (except where the handicap would affect the individual's safe participation in the Program) with respect to their participation in the Program.

(c) The Division Engineer or his designee shall approve applications of individuals or groups applying to participate in the Program. A list of the newly approved participants, by division, shall be submitted to the Program Director for review on the first of each month. The approval of the Division Engineer is final unless the applications are disapproved by the Program Director by the first day of the next calendar month. If the Division Engineer has any uncertainty regarding the qualifications of the individual or group applying to the Program, the Division Engineer shall submit the application and all accompanying documents to the Program Director for final action.

(d) Agreements of adoption shall be for a period of four years.

(e) Each person participating in the Program shall execute a written release of the Department, its officials, employees and agents from any liability arising out of his or her participation in the Program. In the case of a minor, such release shall be executed by a parent or guardian.

(f) Program participants may put recyclable plastic, cans, and glass in blue bags which are furnished by the department and may keep the proceeds received for the recycled materials.

*History Note: Authority G.S. 136-140.1; 143B-350; Eff. November 1, 1991; Amended Eff. August 1, 2002; November 1, 1993.*

**TITLE 21 – OCCUPATIONAL LICENSING BOARDS**

**CHAPTER 17 - BOARD OF DIETETICS/NUTRITION**

**21 NCAC 17 .0101 DEFINITIONS**

As used in this Chapter, the following terms and phrases, which have not already been defined in the Practice Act, G.S. 90-350 through 90-369, shall have the meanings specified:

- (1) "Act" means Dietetics/Nutrition Practice Act.
- (2) "ADA" means The American Dietetic Association.
- (3) "Applicant" means any person who has applied to the Board for a license to practice dietetics/nutrition in the State of North Carolina.
- (4) "Application" means a written request directed to and received by the Board, on forms supplied by the Board, for a license to practice dietetics/nutrition in the State of North Carolina, together with all information, documents and other materials necessary for the Board to act on that application.
- (5) "CDR" means the Commission on Dietetic Registration which is a member of the

- (6) National Commission for Health Certifying Agencies.
- (6) "CADE" means the Commission on Accreditation for Dietetics Education.
- (7) "Degree" means a degree received from a college or university that was regionally accredited at the time the degree was conferred.
- (8) "Dietitian/nutritionist" means one engaged in dietetics/nutrition practice.
- (9) "Executive Secretary" means the person employed to carry out the administrative functions of the Board.
- (10) "Health care practitioner " shall include any individual who is licensed under G.S. 90.
- (11) "Nutrition assessment" means the evaluation of the nutrition needs of individuals and groups based upon biochemical, anthropometric, physical, and food intake and diet history data to determine nutritional needs and recommend appropriate nutrition intake including enteral and parenteral nutrition.
- (12) "Nutrition counseling" means the advice and assistance provided by licensed dietitians/nutritionists to individuals or groups on nutrition intake by integrating information from the nutrition assessment with information on food and other sources of nutrient and meal preparation consistent with cultural background, socioeconomic status and therapeutic needs.
- (13) "Provisionally licensed dietitian/nutritionist" means a person provisionally licensed under this act.
- (14) "Equivalent major course of study" means one which meets the knowledge requirements of the ADA-Approved Didactic program in Dietetics as referenced in the most current edition of the "Accreditation/Approval Manual for Dietetic Education Programs". This standard includes any subsequent amendments and editions of the referenced material. Copies of this manual may be purchased from the ADA Sales Order Department, P.O. Bx 97215, Chicago, IL 60678-7215 at a cost of twenty-nine dollars and ninety-five cents (\$29.95).
- (15) "Supervised practice program" means one which meets the standards of the ADA-approved/accredited supervised practice program in dietetics as referenced in the most current edition of the "Accreditation/Approval Manual for Dietetic Education Programs". This standard includes any subsequent amendments and editions of the referenced material. Copies of this manual may be purchased from the ADA Sales Order Department, P.O. Box 97215, Chicago, IL 60678-7215 at a cost of twenty-nine dollars and ninety-five cents (\$29.95).

- (16) "Supervision" means that a licensed dietitian/nutritionist shall:
  - (a) be available for consultation on medical nutrition services being performed by the unlicensed person being supervised;
  - (b) provide supervision that is characterized by a direct association with the unlicensed person being supervised; and
  - (c) directly and personally examine, evaluate and approve the acts or functions of the person supervised.

*History Note: Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992; Authority G.S. 90-352; 90-356; Eff. June 1, 1992; Recodified from 21 NCAC 17.0001 Eff. February 1, 1995; Amended Eff. July 1, 2002; March 1, 1996.*

**21 NCAC 17.0104 APPLICATIONS**

- (a) Each applicant for initial licensure or renewal shall file a completed application with the Board.
- (b) Applications shall be typed or written in ink, signed under the penalty of perjury and accompanied by the appropriate nonrefundable fees and by such evidence, statements or documents showing to the satisfaction of the Board that applicant meets requirements.
- (c) Applications are to be submitted to the address designated by the Board.
- (d) Applications and all documents filed in support thereof shall become the property of the Board.
- (e) The Board shall not consider an application until the applicant pays the application fee.
- (f) Applicant seeking examination eligibility from the Board must submit application at least 60 days prior to the date the applicant wishes to take the examination.
- (g) The Executive Secretary shall send a notice to an applicant who does not complete the application which lists the additional materials required.
- (h) Applicants, who must provide evidence of current registration as a Registered Dietitian by the CDR in G.S. 90-357(3)a, shall submit a notarized photocopy of the applicant's signed registration identification card.
- (i) Applicants, who must provide evidence of completing academic requirements in G.S. 90-357(3) b.1, c.1 and d, shall either:
  - (1) Submit transcripts and a verification statement which includes the original signature of the Program Director of a college or university in which the course of study has been approved as meeting the current knowledge requirements of the ADA; or
  - (2) Submit sufficient documentation for the Board to determine if the supervised practice program meets the ADA requirements as referenced in 21 NCAC 17.0101(14).
- (j) Applicants, who must provide evidence of completing supervised practice program in G.S. 90-357(3)b.2 and c.2, shall either:

- (1) Submit a verification statement which includes the original signature of the Program Director or Sponsor of a supervised practice program; or
- (2) Submit sufficient documentation for the Board to determine if the supervised practice program meets the ADA requirements as referenced in 21 NCAC 17 .0101(14).

(k) Applicants who have obtained their education outside of the United States and its territories must:

- (1) Have their academic degree evaluated by CDR, as equivalent to the baccalaureate or higher degree conferred by a U.S. college or university accredited by the regional accrediting agencies recognized by the Council on Postsecondary Accreditation and the U.S. Department of Education; and
- (2) Have any Board required documents submitted in a language other than English be accompanied by a certified translation thereof in English from World Education Services, Inc.

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**21 NCAC 17 .0105 EXAMINATION FOR LICENSURE**

- (a) The Board approves the examination offered by the Commission on Dietetic Registration (CDR).
- (b) The examination shall be offered by ACT year round at designated ACT testing centers to qualified applicants for licensing.
- (c) The Board recognizes the passing score set by the CDR.

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**21 NCAC 17 .0107 PROVISIONAL LICENSE**

- (a) Applicants for a provisional license shall provide evidence of completing academic requirements by:
  - (1) Submitting transcripts and a verification statement which includes the original signature of the Program Director of a college or university in which the course of study has been approved as meeting the current knowledge requirements of the ADA; or
  - (2) Submit sufficient documentation for the Board to determine if the supervised practice program meets the ADA requirements as referenced in 21 NCAC 17 .0101.
- (b) Applicants shall provide evidence of completing supervised practice program by:

- (1) Submitting a verification statement which includes the original signature of the Program Director or Sponsor of a supervised practice program which has been approved by CDR to meet the dietetic practice requirements of ADA; or
- (2) Submit sufficient documentation for the Board to determine if the supervised practice program meets the ADA requirements as referenced in 21 NCAC 17 .0101(14).

- (c) Applicants shall provide evidence of making application to take the examination.
- (d) Provisional license may be issued for a period not exceeding one year upon completion of the following:
  - (1) payment of issuance fees;
  - (2) submission of completed application as prescribed by the Board; and
  - (3) provision of evidence of being under the supervision of licensed dietitian(s)/nutritionist(s).
- (e) Following the successful completion of the licensing examination, the provisionally licensed dietitian/nutritionist shall remit completed application for upgrading license, payment of fees, and evidence of passing examination referenced in 21 NCAC 17 .0105. If the provisionally licensed dietitian/nutritionist successfully completes the licensing examination and obtains a license pursuant to G.S. 90-357 within six months of the date that the provisional license became effective, the provisional license or renewal fee shall be deducted from the issuance fee.

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**21 NCAC 17 .0109 ISSUANCE AND RENEWAL OF LICENSE**

- (a) An applicant shall be issued a license based on compliance with requirements stated in G.S. 90-357 and the rules in this Chapter.
- (b) Licensee shall notify the Board of any change in the licensee's personal or professional address within 30 days of that change.
- (c) Licenses shall expire on March 31 of every year. Beginning in 1993, the licenses shall be issued for a period of one year beginning April 1 and ending March 31.
- (d) At least 60 days prior to the expiration date of the license, the licensee shall be sent written notice of the amount of renewal fee due, and a license renewal form which must be returned with the required fee.
- (e) Licensee's renewal application must be postmarked prior to the expiration date in order to avoid the late renewal fee. Failure to receive renewal notice shall not be justification for late renewal.
- (f) The Board may not renew the license of a person who is in violation of the Act, or Board rules at the time of application for renewal.

(g) Applicants for renewal of licenses shall provide documentation of having met continuing education requirements by submitting either:

- (1) Evidence of completing continuing education hours to maintain certification as a Registered Dietitian by the Commission on Dietetic Registration. These standards are contained in the "Professional Development Portfolio", which is hereby incorporated by reference including subsequent amendments or additions of reference material. Copies of this standard may be obtained from the Commission on Dietetic Registration, the American Dietetic Association, 216 West Jackson Boulevard, Suite 800, Chicago, Illinois 60606-6995, at a cost of twenty-five dollars (\$25.00); or
- (2) A summary of continuing education on the form provided by the Board documenting completion of 30 hours of continuing education for a two year period as referenced in the "Professional Development Portfolio".

(h) A renewal license shall be furnished to each licensee who meets all renewal requirements by the expiration date.

(i) The Board shall renew a license upon the payment of a late fee within 60 days of the expiration date of March 31. If the license has been expired for 60 days or less, the license may be renewed by returning the license renewal form with all appropriate fees and documentation to the Board, postmarked on or before the end of the 60-day grace period.

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**21 NCAC 17.0114 CODE OF ETHICS FOR PROFESSIONAL PRACTICE AND CONDUCT**

Licensees, under the Act, shall comply with the following Code of Ethics in their professional practice and conduct. The Code reflects the ethical principles of the dietetic/nutrition professional and outlines obligations of the licensee to self, client, society and the profession.

- (1) The licensee shall provide professional services with objectivity and with respect for the unique needs and values of individuals as determined through the nutritional assessment.
- (2) The licensee shall not deny services or employment to individuals based on that individual's race, creed, religion, sex, age, national origin or handicap.
- (3) The licensee shall conduct all practices of dietetics/nutrition with honesty and integrity.
- (4) The licensee shall present substantiated information and interpret controversial information without personal bias, recognizing that legitimate differences of opinion exist. The licensee shall make all reasonable effort to avoid bias of any kind in the professional evaluation of others.

- (5) The licensee shall practice dietetics/nutrition based on scientific principles and current information.
- (6) The licensee shall assume responsibility and accountability for personal competence in practice.
- (7) The licensee shall inform the public of his/her services by using factual information and shall not advertise in a false or misleading manner.
- (8) The licensee shall not exercise undue influence on a client, including the promotion of the sale of services or products. The licensee shall be alert to any conflicts of interest and shall provide full disclosure when a real or potential conflict of interest arises.
- (9) The licensee shall not reveal information about a client obtained in a professional capacity, without prior consent of the client, except as authorized or required by law and shall make full disclosure about any limitations on his/her ability to guarantee this.
- (10) The licensee shall recognize and exercise professional judgment within the limits of the licensee's qualifications and shall not accept or perform professional responsibilities which the licensee knows or has reason to know that he or she is not qualified to perform.
- (11) The licensee shall take reasonable action, with prior consent of the client, to inform a client's physician or other allied health care practitioner in cases where a client's nutritional status indicates a change in health status.
- (12) The licensee shall give sufficient information based on the client's ability to process information such that the client can make his or her own informed decisions.
- (13) The licensee shall accurately present professional qualifications and credentials according to G.S. 90-640 of Article 37 and as follows:
  - (a) The licensee shall use "LDN" when license is current.
  - (b) The licensee shall provide accurate information and comply with all rules of the North Carolina Board of Dietetics/Nutrition when seeking continued credentials from the North Carolina Board of Dietetics/Nutrition.
  - (c) The licensee shall not aid another person in violating any North Carolina Board of Dietetics/Nutrition rules or aid another person in representing himself/herself as an "LD", "LN" or "LDN" when he/she is not.
- (14) The licensee shall permit use of that licensee's name for the purpose of certifying that dietetic/nutrition services have been rendered only if the licensee has provided or supervised those services.

- (15) When providing supervision to a student, trainee, provisional licensee, or person aiding the practice of dietetics/nutrition, the licensee shall assume responsibility for the person being supervised.
- (16) The licensee shall comply with all laws and rules concerning the profession.
- (17) The licensee shall uphold the Code of Ethics for professional practice and conduct by reporting suspected misrepresentations and violations of the Code and the Act to the Board.
- (18) The licensee shall not interfere with an investigation of disciplinary proceeding by willful misrepresentation of facts to the Board or its representative or by the use of threats or harassment against any person.
- (19) The licensee may be subject to disciplinary action by the Board under the following circumstances:
  - (a) The licensee is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his/her ability to practice dietetics/nutrition.
  - (b) The licensee has been adjudged to be mentally incompetent in a court of competent jurisdiction or a determination thereof by other lawful means. This adjudication of mental incompetency shall be conclusive proof of unfitness to practice dietetics/nutrition unless or until such person shall have been subsequently lawfully declared to be mentally competent.
  - (c) The licensee is mentally, emotionally, or physically unfit to practice dietetics/nutrition and is afflicted with such a mental, emotional or physical disability as to be dangerous to the health and welfare of a client.
  - (d) The licensee has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude under the laws of the United States or any of the states.
  - (e) The licensee has been disciplined by another state and at least one of the grounds for the discipline is the same or substantially equivalent to the grounds for discipline in this state.
  - (f) The licensee has committed an act of misfeasance or malfeasance in the practice of dietetics/nutrition as determined by a court of competent jurisdiction, a licensing board, or an agency of a governmental body.

(g) The licensee has violated any provisions of the act or any of these Rules.

- (20) The licensee shall not engage in kissing, fondling, touching or engaging in any activities, advances, or comments of a sexual nature with any person with whom the licensee interacts within the professional setting.

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**21 NCAC 17 .0116 VIOLATIONS, COMPLAINTS, SUBSEQUENT BOARD ACTION, AND HEARINGS**

(a) The definitions contained in G.S. 150B-2 (1), (2), (2b), (4a), (4b), (5), (8), (8a), (8b) are incorporated by reference within this Rule. In addition, the following definitions apply:

- (1) "Administrative Law Counsel" means an attorney whom the Board has retained to serve as procedural counsel to advise the hearing officer concerning questions of procedure for contested cases.
- (2) "Prosecuting Attorney" means the attorney retained by the Board to prepare and prosecute contested cases.

(b) Before the North Carolina Board of Dietetics/Nutrition makes a final decision in any contested case, the person, applicant or licensee affected by such decision shall be afforded an administrative hearing pursuant to the provisions of Article 3A, Chapter 150B of the North Carolina General Statutes.

- (1) The paragraphs contained in this Rule shall apply to the conduct of all contested cases heard before or for the North Carolina Board of Dietetics/Nutrition.
- (2) The following general statutes, rules, and procedures apply and are incorporated by reference within this Rule, unless another specific statute or rule of the North Carolina Board of Dietetics/Nutrition provides otherwise: the Rules of Civil Procedure as contained in G.S. 1A-1, the Rules of Evidence pursuant to G.S. Chapter 8C; the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes and Canons 1, 2 and 3 of the Code of Judicial Conduct adopted in accordance with G.S. 7A-10.1.
- (3) Every document filed with the Board shall be signed by the person, applicant, licensee, or the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, title/position, address, and telephone number. If the individual involved is a licensed dietitian/nutritionist, the license number shall appear on all correspondence

with the Board. An original and one copy of each document shall be filed.

(c) Anyone may complain to the Board alleging that a person, applicant or licensee has committed an action prohibited by G.S. 90-350 through 90-369 or the rules of the Board.

- (1) A person wishing to complain about an alleged violation of G.S. 90-350 through G.S. 90-369 or the rules of the Board may notify the Executive Secretary. A complaint regarding the Executive Secretary, the staff or the Board may be directed to the chair of the Board or any Board member.
- (2) The initial notification of a complaint may be in writing, by telephone, or by personal visit to the Executive Secretary's office.
- (3) Upon receipt of a complaint, the Executive Secretary, unless the health and safety of the public otherwise requires, shall send to the complainant an acknowledgement letter, and request the complainant complete and file a complaint form before further action shall be taken.

(d) An Investigator or other authorized Board staff shall investigate a complaint and may take one or more of the following actions:

- (1) determine that an allegation is groundless and dismiss the complaint;
- (2) determine that the complaint does not come within the Board's jurisdiction, advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such complaints;
- (3) determine that a nonlicensed person has committed a prohibited action and take appropriate legal action against the violator;
- (4) determine that a licensee has violated the Act or the rules of the Board and propose an enforcement action authorized by law.

(e) Whenever a complaint is dismissed or a complaint file closed, the Executive Secretary shall give a summary report of the final action to the Board, the complainant, and the accused party.

(f) In accordance with G.S. 150B-3(c), a license may be summarily suspended if Board finds that the public health, safety, or welfare requires emergency action. Such a finding shall be incorporated with the order of the Board and the order shall be effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and shall continue to be effective during the proceedings. Failure to receive the order because of refusal of service or unknown address does not invalidate the order. Proceedings shall be promptly commenced.

(g) The Board, through its staff, shall issue a Letter of Charges only upon completion of an investigation of a written complaint and review with legal counsel or prosecuting attorney.

- (1) Subsequent to an investigation and validation of a complaint, a Letter of Charges shall be sent on behalf of the Board to the person, applicant or licensee who is the subject of the complaint.

(A) The Letter of Charges shall be served in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(B) The Letter of Charges shall serve as the Board's formal notification to the person that an allegation of possible violation(s) of the Act or the rules of the Board has been initiated.

(C) The Letter of Charges shall not in and of itself constitute a contested case.

(2) The Letter of Charges shall include the following:

(A) a short and plain statement of the factual allegations;

(B) a citation of the relevant sections of the statutes or rules involved;

(C) notification that a settlement conference will be scheduled upon request;

(D) explanation of the procedure used to govern the settlement conference;

(E) notification that if a settlement conference is not requested, or if held, does not result in resolution of the case, a contested case hearing will be scheduled; and

(F) an offer of voluntary surrender or reprimand also may be included for alleged violations of the Act.

(3) A case becomes a contested case after the agency and the person, applicant or licensee do not agree to a resolution of the dispute through a settlement conference or either the agency or the person, applicant or licensee requests a contested case hearing.

(h) No Board member shall discuss with any party the merits of any case pending before the Board. If a party files in good faith an affidavit of personal bias or other reason for disqualification of any member of the Board, the Board shall determine the matter as part of the record in the case.

(i) A settlement conference, if requested by the applicant or licensee, shall be held for the purpose of attempting to resolve a dispute through informal procedures prior to the commencement of formal administrative proceedings.

(1) The conference shall be held in the offices of the Board, unless another site is designated by mutual agreement of all involved parties.

(2) All parties shall attend or be represented at the settlement conference. The parties shall be prepared to discuss the alleged violations and the incidents on which these are based.

(3) At the conclusion of the day during which the settlement conference is held, a form must be signed by all parties which indicates whether the settlement offer is accepted or rejected. Subsequent to this decision:

(A) if a settlement is reached, the Board shall forward a written settlement agreement containing all conditions of the settlement to the other party(ies); or

(B) if a settlement cannot be reached, the case shall proceed to a contested case hearing by the filing of a petition with the Board by the agency, person, applicant, or licensee.

(j) Informal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement or consent order at any time prior to or during the hearing of a contested case.

(k) The Board shall give the parties in a contested case a Notice of Hearing not less than 15 calendar days before the hearing. The Notice shall be given in accordance with G.S. 150B-38(b) and (c). The Notice shall include:

- (1) acknowledgement of service, or attempted service, of the Letter of Charges in compliance with Paragraph (g) of this Rule;
- (2) date, time, and place of the hearing;
- (3) a short and plain statement of the factual allegations;
- (4) a citation of the relevant sections of the statutes or rules involved;
- (5) notification of the right of a party to represent himself or to be represented by an attorney;
- (6) a statement that, pursuant to Paragraph (n) of this Rule, subpoenas may be requested by the licensee to compel the attendance of witnesses or the production of documents;
- (7) a statement advising the licensee that a notice of representation, containing the name of licensee's counsel, if any, shall be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing;
- (8) a statement advising the licensee that a list of witnesses for the licensee shall be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing; and
- (9) a statement advising the licensee that failure to appear at the hearing may result in the allegations of the Letter of Charges being taken as true and that the Board may proceed on that assumption.

(l) Prehearing conferences may be held to simplify the issues to be determined, to obtain stipulations in regards to foundations for testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing, and to consider such other matters that may be necessary or advisable for the efficient and expeditious conduct of the hearing.

- (1) The prehearing conference shall be conducted in the offices of the Board, unless another site is designated by mutual agreement of all parties.
- (2) The prehearing conference shall be an informal proceeding and shall be conducted by a Board-designated member.
- (3) All agreements, stipulations, amendments, or other matters resulting from the prehearing conference shall be in writing, signed by all parties, and introduced into the record at the

beginning of the formal administrative hearing.

(m) Prehearing conferences or administrative hearings conducted before a majority of Board members shall be held in the county where the Board maintains its principal office, or by mutual consent in another location which will better promote the ends of justice or better serve the convenience of witnesses or the Board. For those proceedings conducted by an Administrative Law Judge, the venue shall be determined in accordance with G.S. 150B-38(e). All hearings conducted by the Board shall be open to the public.

(n) The Board may issue subpoenas for the Board or a licensee, in preparation for, or in the conduct of, a contested case.

- (1) Subpoenas for the attendance and testimony of witnesses or the production of documents or information, either at the hearing or for the purposes of discovery, shall be issued in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45.
- (2) Requests by a licensee for subpoenas shall be made in writing to the Board and shall include the following:
  - (A) the full name and home or business address of all persons to be subpoenaed; and
  - (B) the identification, with specificity, of any documents or information being sought.
- (3) Subpoenas shall include the date, time, and place of the hearing and the name and address of the party requesting the subpoena. In the case of subpoenas for the purpose of discovery, the subpoena shall include the date, time, and place for responding to the subpoena.
- (4) Subpoenas shall be served as in the manner provided by G.S. 150B-39 and G.S. 1A-1, Rule 45. The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314.
- (5) Objections to subpoenas shall be heard in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45.

(o) All motions related to a contested case, except motions for continuance and those made during the hearing, shall be in writing and submitted to the Board at least 10 calendar days before the hearing, if any, is to be held either on the motion or the merits of the case. Prehearing motions shall be heard at a prehearing conference or at the contested case hearing prior to the commencement of testimony. The Board-designated hearing officer shall hear the motions and the response from the non-moving party pursuant to Rule 6 of the General Rules of Practice for the Superior and District Courts and rule on such motions. If the prehearing motions are heard by an Administrative Law Judge from Office of Administrative Hearings, the provisions of G.S. 150B-40(e) shall govern the proceedings.

(p) Motions for a continuance of a hearing may be granted upon a showing of good cause.

- (1) Unless time does not permit, a request for a continuance of a hearing shall be made in

writing and received by the office of the Board no less than seven calendar days before the hearing date. In determining whether good cause exists, consideration shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven calendar days from the date of the hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of the hearing shall be ruled on by the hearing officer or the Administrative Law Judge. All other motions for continuance shall be ruled on by the majority of the Board members or Administrative Law Judge sitting at the hearing.

- (A) "Good cause" includes: death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is clearly necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the administrative law judge have agreed to new hearing date or parties have agreed to a settlement of the case that has been or is likely to be approved by the final decision maker.
- (B) "Good cause" shall not include: intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged; unavailability of a witness if the witness testimony can be take by deposition, and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.
- (2) During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the Board shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient. In such situations and to such extent as possible, the seated members of the Board and the Board-designated hearing

officer shall receive the additional testimony. In the event that new members of the Board or a different hearing officer must participate, a copy of the transcript of the hearing shall be provided to them prior to the receipt of the additional testimony.

- (3) A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory or regulatory deadline.
- (q) All hearings by the Board shall be conducted by a majority of members of the Board, except as provided in Subparagraph (1) of this Paragraph. The Board shall designate one of its members to preside at the hearing. The Board shall designate an administrative law counsel as procedural officer to conduct the proceedings of the hearing. The seated members of the Board shall hear all evidence, make findings of fact and conclusions of law, and issue an order reflecting a majority decision of the Board.
  - (1) When a majority of the members of the Board is unable or elects not to hear a contested case, the Board shall request the designation of an administrative law judge from the Office of Administrative Hearings to preside at the hearing. The provisions of G.S. 150B, Article 3A, and 21 NCAC 17 .0116 shall govern a contested case in which an administrative law judge is designated as the Hearing Officer.
  - (2) In the event that any party or attorney at law or other representative of a party engages in behavior that obstructs the orderly conduct of proceedings or would constitute contempt if done in the General Court of Justice, the Board may apply to the applicable superior court for an order to show cause why the person(s) should not be held in contempt of the Board and its processes.
- (r) All parties may present evidence, rebuttal testimony, and argument with respect to the issues of law and policy, and to cross-examine witnesses. The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall apply to contested case proceedings, except as provided otherwise in this Rule and G.S. 150B-41.
  - (1) Sworn affidavits may be introduced by mutual agreement from all parties.
  - (2) All oral testimony shall be under oath or affirmation and shall be recorded. Unless otherwise stipulated by all parties, witnesses are excluded from the hearing room until such time that they have completed their testimony and have been released.
- (s) Upon compliance with the provisions of G.S. 150B-40(e), if applicable, and G.S. 150B-42, and review of the official record, as defined in G.S. 150B-42(b) and (c), the Board shall make a written final decision or order in a contested case.
  - (1) The final decision or order shall be rendered by the Board meeting in quorum and by a majority of those present and voting.
  - (2) The decision or order shall be made based on:
    - (A) competent evidence and arguments presented during the hearing and

made a part of the official record in accordance with G.S. 150B-41 and Paragraph (r) of this Rule;

- (B) stipulations of fact;
- (C) matters officially noticed;
- (D) other items in the official record that are not excluded by G.S. 150B-41 and Paragraph (r) of this Rule.

(3) All final decisions or orders shall be signed by the Executive Secretary and the Chair of the Board.

(4) A copy of the decision or order shall be served as in the manner provided by G.S. 150B-41(a). The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314.

(t) The official record of a contested case is available for public inspection upon reasonable request.

- (1) The official record shall be prepared in accordance with G.S. 150B-42(b) and (c).
- (2) Contested case hearings shall be recorded either by a magnetic type recording system or a professional court reporter using stenomask or stenotype.
- (3) Transcripts of proceedings during which oral evidence is presented shall be made only upon request of a party. Transcript costs shall include the cost of an original for the Board. Cost of the transcript or part thereof or copy of said transcript or part thereof which a party requests shall be divided equally among the party(ies) requesting a transcript. Cost shall be determined under supervision of the Executive Secretary.

*History Note: Filed as a Temporary Adoption Eff. July 16, 1992 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Authority G.S. 90-356; 90-363; Eff. November 30, 1992; Recodified from 21 NCAC 17 .0016 Eff. February 1, 1995; Amended Eff. July 1, 2002; January 1, 1996.*

**21 NCAC 17 .0302 REQUIREMENTS**

A student or trainee is exempt pursuant to G.S. 90-360(2) when enrolled in a course of study not to exceed five years. The Board may approve or disapprove a request for an extension of the period of time based upon circumstances beyond the control of the student or trainee.

*History Note: Authority G.S. 90-356(2); 90-368(2); Eff. March 1, 1996; Amended Eff. July 1, 2002.*

**21 NCAC 17 .0303 SUPERVISION**

- (a) A planned, continuous program in clinical practice pursuant to G.S. 90-357(3)b.2. shall designate a licensed dietitian/nutritionist who shall supervise a student or trainee; and
  - (1) shall meet the qualifications of the current standards of education as referenced in the

most current edition of the "Accreditation/Approval Manual for Dietetic Education Programs", which is hereby incorporated by reference including any subsequent amendments and editions of the referenced material. Copies of this manual may be purchased from the ADA Sales Order Department, P.O. Box 97215, Chicago, IL 60678-7215; and

- (2) shall meet his/her employment qualifications of the sponsoring institution, if any.

(b) In accordance with the current standards of education referenced in this Rule, a Program Director shall:

- (1) provide student/trainee advisement, evaluation, counseling and supervision;
- (2) provide academic or supervised practice program assessment, planning, implementation and evaluation;
- (3) inform student(s)/trainee(s) of laws, regulations and standards affecting the practice of dietetics/nutrition, including but not limited to the Dietetics/Nutrition Practice Act and its Rules; and
- (4) advise student(s)/trainee(s) on meeting the requirements to be licensed to practice dietetics/nutrition.

*History Note: Authority G.S. 90-356(2); 90-357; Eff. March 1, 1996; Amended Eff. July 1, 2002.*

**21 NCAC 17 .0304 RECORDS AND REPORTS**

(a) Permanent and current records from approved clinical practice programs shall be available for review by representatives of the Board. The Board may make use of facts supplied in determining compliance with G.S. 90-368 and in approving applications for a license.

(b) The Board may require additional records and reports for review at any time to provide evidence and substantiate compliance with standards of education, the law and the rules of the Board.

*History Note: Authority G.S. 90-356(2); 90-368(2); 90-357; Eff. March 1, 1996; Amended Eff. July 1, 2002.*

**CHAPTER 36 - BOARD OF NURSING**

**21 NCAC 36 .0405 APPROVAL OF NURSE AIDE EDUCATION PROGRAMS**

(a) The Board of Nursing shall accept those programs approved by DFS to prepare the nurse aide I.

(b) The North Carolina Board of Nursing shall approve nurse aide II programs. Nurse aide II programs may be offered by an individual, agency, or educational institution after the program is approved by the Board.

- (1) Each entity desiring to offer a nurse aide II program shall submit a program approval application at least 60 days prior to offering the program. It shall include documentation of the following standards:

- (A) policy established which provides for supervised clinical experience with faculty/student ratio not to exceed 1:10;
  - (B) Board of Nursing approval of each clinical facility for student use as defined in 21 NCAC 36 .0322(b);
  - (C) a written contract between the program and clinical facility prior to admitting students to the facility for clinical experience;
  - (D) admission requirements which include:
    - (i) successful completion of nurse aide I training program or Board of Nursing established equivalent and current nurse aide I listing on DFS Registry; and
    - (ii) other admission requirements as identified by the program; and
  - (E) policy regarding the processing and disposition of program and student complaints.
- (2) Level II nurse aide programs shall include a minimum of 80 hours of theory and 80 hours of supervised clinical instruction consistent with the legal scope of practice as defined by the Board of Nursing in Rule .0403(b) of this Section. Requests by the programs to modify the nurse aide II course content shall be directed to the Board office.
- (3) The Board shall identify and publish minimum competency and qualifications for faculty for the nurse aide Level II programs. These are:
- (A) hold a current unrestricted license to practice as a registered nurse in North Carolina;
  - (B) have had at least two years of direct patient care experiences as an R.N.; and
  - (C) have experience teaching adult learners.
- (4) Each nurse aide II program shall furnish the Board records, data, and reports requested by the Board in order to provide information concerning operation of the program and any individual who successfully completes the program.
- (5) When an approved nurse aide II program closes, the Board shall be notified in writing by the program. The Board shall be informed as to permanent storage of student records.

(c) An annual program report shall be submitted by the Program Director to the Board of Nursing on Board form by March 15 of each year. Failure to submit an annual report shall result in administrative action affecting approval status as described in 21 NCAC 36 .0405(5)(d) and (e). Complaints regarding nurse aide II programs may result in an on site survey by the North Carolina Board of Nursing.

(d) Approval status shall be determined by the Board of Nursing using the annual program report, survey report and other data submitted by the program, agencies, or students. The determination shall result in full approval or approval with stipulations.

(e) If stipulations have not been met as specified by the Board of Nursing, a hearing shall be held by the Board of Nursing regarding program approval status. A program may continue to operate while awaiting the hearing before the Board. **EXCEPTION:** In the case of summary suspension of approval as authorized by G.S. 150B(3)(c), the program must immediately cease operation.

(1) When a hearing is scheduled, the Board shall cause notice to be served on the program and shall specify a date for the hearing to be held not less than 20 days from the date on which notice is given.

(2) If the Board determines from evidence presented at hearing that the program is complying with the Law and all rules, the Board shall assign the program Full Approval status.

(3) If the Board, following a hearing, finds that the program is not complying with the Law and all rules, the Board shall withdraw approval.

(A) This action constitutes discontinuance of the program; and

(B) The parent institution shall present a plan to the Board for transfer of students to approved programs or fully refund tuition paid by the student. Closure shall take place after the transfer of students to approved programs within a time frame established by the Board; and

(C) The parent institution shall notify the Board of the arrangements for storage of permanent records.

*History Note: Authority G.S. 90-171.20(2)(4)(7)d., e., g.; 90-171.43(4); 90-171.55; G.S. 90-171.83; 42 U.S.C.S. 1395i-3 (1987); Eff. March 1, 1989; Amended Eff. August 1, 2002; July 1, 2000; December 1, 1995; March 1, 1990.*

**CHAPTER 48 - EXAMINING COMMITTEE OF PHYSICAL THERAPY**

**21 NCAC 48A .0103 MEMBERSHIP OF BOARD**

(a) Selection of Board Members. Nominations for members of the Board shall be sought from licensees residing in North Carolina. The ballots that are distributed to each licensee in North Carolina shall list each nominee's place and location of employment and practice setting. The ballots shall be forwarded to the President of the North Carolina Physical Therapy Association.

(b) Decisions. Decisions shall be reached by a majority of the Board Members present and eligible to participate provided that a quorum consists of five Board Members.

*History Note: Authority G.S. 90-270.25; 90-270.26; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. August 1, 2002; August 1, 1998; April 1, 1989; May 1, 1988; December 30, 1985; October 28, 1979.*

**21 NCAC 48C .0101 PERMITTED PRACTICE**

(a) Physical therapy is presumed to include any acts, tests, procedures, treatments or modalities that are routinely taught in educational programs or in continuing education programs for physical therapists and are routinely performed in practice settings.

(b) A physical therapist who employs acts, tests, procedures and modalities in which professional training has been received through education or experience is considered to be engaged in the practice of physical therapy.

(c) A physical therapist must supervise physical therapist assistants, physical therapy aides, PT students and PTA students to the extent required under the Physical Therapy Practice Act and these Rules. Physical therapy aides include all non licensed individuals aiding in the provision of physical therapy services.

(d) Physical therapy, which is the care and services provided by or under the direction and supervision of a physical therapist, includes:

- (1) examining (history, system review and tests and measures) individuals in order to determine a diagnosis, prognosis, and intervention; tests and measures may include, but are not limited to, the following:
  - (A) aerobic capacity and endurance;
  - (B) anthropometric characteristics;
  - (C) arousal, attention, and cognition;
  - (D) assistive and adaptive devices;
  - (E) community and work (job/school/play) integration or reintegration;
  - (F) cranial nerve integrity;
  - (G) environmental, home, and work (job/school/play) barriers;
  - (H) ergonomics and body mechanics;
  - (I) gait, locomotion, and balance;
  - (J) integumentary integrity;
  - (K) joint integrity and mobility;
  - (L) motor function;
  - (M) muscle performance;
  - (N) neuromotor development and sensory integration;
  - (O) orthotic, protective and supportive devices;
  - (P) pain;
  - (Q) posture;
  - (R) prosthetic requirements;
  - (S) range of motion;
  - (T) reflex integrity;
  - (U) self-care and home management;
  - (V) sensory integrity; and
  - (X) ventilation, respiration, and circulation.
- (2) alleviating impairment and functional limitation by designing, implementing, and

modifying therapeutic interventions may include, but are not limited to the following:

- (A) coordination, communication and documentation;
- (B) patient/client-related instruction;
- (C) therapeutic exercise (including aerobic conditioning);
- (D) functional training in self-care and home management (including activities of daily living and instrumental activities of daily living);
- (E) functional training in community and work (jobs/school/play) integration or reintegration activities (including instrumental activities of daily living, work hardening, and work conditioning);
- (F) manual therapy techniques (including mobilization and manipulation);
- (G) prescription, application, and fabrication of assistive, adaptive, orthotic, protective, supportive, and prosthetic devices and equipment that is within the scope of practice of physical therapy;
- (H) airway clearance techniques;
- (I) wound management;
- (J) electrotherapeutic modalities; and
- (K) physical agents and mechanical modalities.

- (3) preventing injury, impairment, functional limitation, and disability, including the promotion and maintenance of fitness, health, and quality of life in all age populations.

(e) The practice of physical therapy is the application of a broad range of evaluation and treatment procedures related to abnormality of human sensorimotor performance. It includes, but is not limited to, tests of joint motion, muscle length and strength, posture and gait, limb length and circumference, activities of daily living, pulmonary function, cardio-vascular function, nerve and muscle electrical properties, orthotic and prosthetic fit and function, sensation and sensory perception, reflexes and muscle tone, and sensorimotor and other skilled performances; treatment procedures such as hydrotherapy, shortwave or microwave diathermy, ultrasound, infra-red and ultraviolet radiation, cryotherapy, electrical stimulation including transcutaneous electrical neuromuscular stimulation, massage, debridement, intermittent vascular compression, iontophoresis, machine and manual traction of the cervical and lumbar spine, joint mobilization, machine and manual therapeutic exercise including isokinetics and biofeedback, and training in the use of orthotic, prosthetic and other assistive devices including crutches, canes and wheelchairs.

*History Note: Authority G.S. 90-270.24; 90-270.26; Eff. December 30, 1985; Amended Eff. August 1, 2002; August 1, 1998; December 1, 1990; October 1, 1989; April 1, 1989.*

**21 NCAC 48C .0402 FUNCTION**

- (a) A physical therapy aide may perform only those acts delegated by a licensed physical therapist or physical therapist assistant.
- (b) A physical therapist or physical therapist assistant must be present in the same facility and supervising any physical therapy aide or student to whom acts are delegated.
- (c) A physical therapy aide shall not engage in the performance of physical therapy activities without supervision by a licensee in accordance with this Subchapter.
- (d) A physical therapy aide shall work under the supervision of a licensee who is present in the facility. This may extend to an off-site setting only when the physical therapy aide is accompanying and working directly with a licensee with a specific patient.
- (e) A physical therapy aide shall not be independently responsible for a patient caseload.

*History Note: Authority G.S. 90-270.24; 90-270.26; Eff. December 30, 1985; Amended Eff. August 1, 2002; August 1, 1998.*

**21 NCAC 48C .0601 RESPONSIBILITIES**

Health care personnel who do not function as physical therapy aides may receive direction from physical therapists with regard to patient related activities, but they must not either refer to or represent their services as physical therapy.

*History Note: Authority G.S. 90-270.34(b)(2); 90-270.24(4); Eff. August 1, 2002.*

**21 NCAC 48D .0107 PERSONS REFUSED EXAMINATION PERMISSION**

- (a) An applicant for licensure who does not meet the requirements as set forth in the Physical Therapy Practice Act shall be refused permission to take the examination.
- (b) Any applicant who is refused permission to take the examination shall be entitled to petition the Board for a contested case hearing pursuant to Subchapter 48G, Section .0500 of this Chapter.

*History Note: Authority G.S. 90-270.26; 90-270.29; 90-270.30; 90-270.36; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. August 1, 2002; December 30, 1985.*

**21 NCAC 48F .0102 FEES**

- (a) The following fees are charged by the Board:
  - (1) application for physical therapist licensure;
    - (A) by endorsement or examination taken in another state, one hundred thirty-five dollars (\$135.00);
    - (B) by examination, one hundred thirty-five dollars (\$135.00);
  - (2) application for physical therapist assistant licensure;
    - (A) by endorsement or examination taken in another state, one hundred thirty-five dollars (\$135.00);
    - (B) by examination, one hundred thirty-five dollars (\$135.00);

- (3) renewal for all persons, eighty dollars (\$80.00);
- (4) penalty for late renewal, twenty dollars (\$20.00) plus renewal fee;
- (5) revival of license lapsed less than five years, thirty dollars (\$30.00) plus renewal fee;
- (6) transfer of licensure information fee, including either the examination scores or licensure verification or both, twenty-five dollars (\$25.00);
- (7) retake examination, sixty dollars (\$60.00);
- (8) certificate replacement or duplicate, twenty-five dollars (\$25.00);
- (9) directory of licensees, ten dollars (\$10.00);
- (10) licensee list or labels or any portion thereof for physical therapists, sixty dollars (\$60.00);
- (11) licensee list or labels or any portion thereof for physical therapist assistants, sixty dollars (\$60.00);
- (12) processing fee for returned checks, maximum allowed by law.

(b) The application fee is not refundable. The Board shall consider written requests for a refund of other fees based on personal or economic hardship.

(c) A certified check, money order or cash is required for payment of application fees listed in Parts (a)(1)(A) and (B), and (a)(2)(A) and (B) of this Rule.

*History Note: Authority G.S. 25-3-512; 90-270.33; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. August 1, 1998; October 1, 1995; October 1, 1994; November 1, 1991; August 1, 1991; Temporary Amendment Eff. October 1, 1999; Amended Eff. August 1, 2002; August 1, 2000.*

**21 NCAC 48F .0105 CHANGE OF NAME AND ADDRESS**

Each licensee must notify the Board within 30 days of a change of name or work or home address.

*History Note: Authority G.S. 90-270.27; Eff. August 1, 2002.*

**21 NCAC 48G .0202 NOTIFICATION**

A person who has not renewed the license by February 1 shall be advised that the license has lapsed by written communication to the last known mailing address on record with the Board. Unless the person has advised the Board that he or she does not intend to renew the license, then a similar notification shall be sent to the person's last known employer in North Carolina. If the person continues to work in North Carolina, his or her employer shall be notified of the lapsed license.

*History Note: Authority G.S. 90-270.26; 90-270.32; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. August 1, 2002; August 1, 1998; April 1, 1989; December 30, 1985; October 28, 1979.*

**21 NCAC 48G .0402 GROUNDS FOR WARNING**

The Board may issue a warning to any licensee who engages in conduct that might lead to the revocation or suspension of a license for the commission of acts prohibited by G.S. 90-270.35 or G.S. 90-270.36 or 21 NCAC 48.

*History Note:* Authority G.S. 90-270.26; 90-270.35; 90-270.36;  
*Eff. October 28, 1979;*  
*Amended Eff. August 1, 2002; August 1, 1998.*

**21 NCAC 48G .0403 CONDITIONS FOR PROBATION OR WARNING**

The Board may require any licensee placed on probation and any licensee to whom a warning is issued to furnish the Board with a certified statement that the licensee will not engage in conduct prohibited by G.S. 90-270.35 or G.S. 90-270.36 or 21 NCAC 48.

*History Note:* Authority G.S. 90-270.26; 90-270.35; 90-270.36;  
*Eff. October 28, 1979;*  
*Amended Eff. August 1, 2002; August 1, 1998.*

**21 NCAC 48G .0512 SUBPOENAS**

(a) Requests for subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be made in writing to the Board, shall identify any document sought with specificity, and shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena. The Board Chair (or Executive Director, if designated by the Chair) of the Board shall issue the requested subpoenas within three days of receipt of the request.

(b) Subpoenas shall contain: the caption of the case; the name and address of the person subpoenaed; the date, hour and location of the hearing in which the witness is commanded to appear; a particularized description of the books, papers, records or objects the witness is directed to bring to the hearing, if any; the identity of the party on whose application the subpoena was issued; the date of issue; the signature of the presiding officer or his designee; and a "return of service". The "return of service" form, as filled out, shows the name and capacity of the person serving the subpoena, the date on which the subpoena was delivered to the person directed to make service, the date on which service was made, the person on whom service was made, the manner in which service was made, and the signature of the person making service.

(c) Subpoenas shall be served as provided by the Rules of Civil Procedure, G.S. 1A-1. The cost of service, fees, and expenses of any witnesses or any documents subpoenaed shall be paid by the party requesting the subpoena. The subpoena shall be issued in duplicate, with a "return of service" form attached to each copy. A person serving the subpoena shall fill out the "return of service" form for each copy and properly return one copy to the Board with the attached "return of service" form completed.

(d) Any person receiving a subpoena from the Board may object thereto by filing a written objection to the subpoena with the Board's office. Such objection shall include a concise, but complete, statement of reasons why the subpoena should be quashed or modified. These reasons may include lack of relevancy of the evidence sought, or any other reason sufficient

in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardship.

(e) Any objection to a subpoena must be served on the party who requested the subpoena simultaneously with the filing of the objection with the Board.

(f) The party who requested the subpoena may file a written response to the objection within such time period allowed by the Board. The written response shall be filed with the Board and served by the requesting party on the objecting witness.

(g) After receipt of the objection and response thereto, if any, the Board shall issue a notice to the party who requested the subpoena and the party challenging the subpoena, and may notify any other party or parties of an open hearing before the presiding officer, to be scheduled as soon as practicable. At the hearing, evidence and testimony may be presented, limited to the narrow questions raised by the objection and response.

(h) Promptly after the close of such hearing, the presiding officer will rule on the challenge and issue a written decision. A copy of the decision will be issued to all parties and made a part of the record.

*History Note:* Authority G.S. 90-270.26; 150B-39; 150B-40;  
*Eff. October 1, 1995;*  
*Amended Eff. August 1, 2002.*

**21 NCAC 48G .0517 MODIFICATION OF DECISION**

(a) A person who has been disciplined by the Board may apply to the Board for modification of the discipline at any time after the effective date of the Board's decision imposing it; however, if any previous application has been made with respect to the same discipline, no additional application shall be considered before the lapse of one year following the Board's decision on that previous application. Provided, however, that an application to modify permanent revocation shall not be considered until after two years from the date of the original discipline, nor more often than two years after the Board's last decision on any prior application for modification.

(b) The application for modification of discipline shall be in writing, shall set out and shall demonstrate good cause for the relief sought.

(c) "Good cause" as used in Paragraph (b) of this Rule means that the applicant is completely rehabilitated with respect to the conduct which was the basis of the discipline. Evidence demonstrating such rehabilitation shall include evidence:

(1) that such person has not engaged in any conduct during the discipline period which, if that person had been licensed during such period, would have constituted the basis for discipline by the Board; and

(2) that, with respect to any criminal conviction which constituted any part of the previous discipline, the person has completed the sentence imposed.

(d) In determining good cause, the Board may consider all the applicant's activities since the disciplinary penalty was imposed, the offense for which the applicant was disciplined, the applicant's activities during the time the applicant was in good standing with the Board, the applicant's rehabilitative efforts, restitution to damaged parties in the matter for which the penalty

***APPROVED RULES***

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was imposed, and the applicant's general reputation for truth and professional probity.

(e) No application for modification of discipline shall be considered while the applicant is serving a sentence for any criminal offense. Serving a sentence includes incarceration, probation (supervised or unsupervised), parole, or suspended sentence, any of which are imposed as a result of having been convicted or plead to a criminal charge.

(f) An application shall ordinarily be ruled upon by the Board on the basis of the evidence submitted in support thereof. However, the Board may make additional inquiries of any person or persons, or request additional evidence it deems appropriate.

*History Note: Authority: G.S. 90-270.26; 150B-42; Eff. August 1, 2002.*

## RULES REVIEW COMMISSION

This Section contains the agenda for the next meeting of the Rules Review Commission on Thursday, September 20, 2001, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners by Friday, September 14, 2001 at 5:00 p.m. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

### RULES REVIEW COMMISSION MEMBERS

#### Appointed by Senate

Paul Powell - Chairman  
Robert Saunders  
Laura Devan  
Jim Funderburke  
David Twiddy

#### Appointed by House

John Arrowood - 1<sup>st</sup> Vice Chairman  
Jennie J. Hayman 2<sup>nd</sup> Vice Chairman  
Walter Futch  
Jeffrey P. Gray  
George Robinson

### RULES REVIEW COMMISSION MEETING DATES

September 20, 2001  
October 18, 2001

November 15, 2001  
December 20, 2001

## RULES REVIEW COMMISSION

August 16, 2001

### MINUTES

The Rules Review Commission met on Thursday morning, August 16, 2001, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present: Chairman Paul Powell, Jeffrey Gray, Jennie Hayman, Laura Devan, David Twiddy, George Robinson, Jim Funderburk, Robert Saunders, John Arrowood and Walter Futch.

Staff members present were: Joseph J. DeLuca, Staff Director; Bobby Bryan, Rules Review Specialist; and Lisa Johnson.

The following people attended:

Harry Wilson	State Board of Education
Ben F. Massey, Jr.	NC Board of Physical Therapy Examiners
Thomas Allen	DENR/DAQ
Lt. Dave A. Moody	NC DMV Enforcement
Dedra Alston	DENR
Sandy Sands	Womble Carlyle
Joy Mayo	Womble Carlyle
Joan Troy	NC Wildlife Resources Commission
Emily Lee	NC Dept. of Transportation
Grady McCallie	NC Conservation Network
John Silverstein	NC Board of Physical Therapy Examiners Attorney

### APPROVAL OF MINUTES

The meeting was called to order at 10:05 a.m. with Chairman Powell presiding. Chairman Powell asked for any discussion, comments, or corrections concerning the minutes of the July 19, 2001, meeting. The minutes were approved as written.

### FOLLOW-UP MATTERS

10 NCAC 45G .0306: DHHS/Commission for MH/DD/SAS – The rule submitted by the agency was approved by the Commission.  
10 NCAC 45H .0203, .0204: DHHS/Commission for MH/DD/SAS – No action was taken.  
12 NCAC 9B .0101: Criminal Justice Education & Training Standards Commission – The rule submitted by the agency was approved by the Commission.  
15A NCAC 18A .3334: Commission for Health Services – No action was taken.  
16 NCAC 6D .0305: State Board of Education – The rule submitted by the agency was approved by the Commission.

## ***RULES REVIEW COMMISSION***

16 NCAC 6G .0305: State Board of Education – The Commission objected to the original rule due to ambiguity based on issues raised by Commissioner Futch in August 8, 2001 email message and approved a rewritten rule if the technical change is received by the end of the day. The technical change was subsequently received.

21 NCAC 48A .0105: NC Board of Physical Therapy Examiners – The rule submitted by the agency was approved by the Commission.

21 NCAC 48B .0101; .0104: NC Board of Physical Therapy Examiners – Rule .0101 was approved by the Commission. Rule .0104 was returned to the agency at its request.

21 NCAC 48C .0102: NC Board of Physical Therapy Examiners – The rule submitted by the agency was approved by the Commission.

21 NCAC 48E .0110: NC Board of Physical Therapy Examiners – The rule submitted by the agency was approved by the Commission.

21 NCAC 48G .0204; .0405; .0504; .0602: NC Board of Physical Therapy Examiners – The rules submitted by the agency were approved by the Commission with the exception of .0504 which was approved conditioned upon receiving a change by the end of the day. The change was subsequently received.

### **LOG OF FILINGS**

Chairman Powell presided over the review of the log and all rules were approved with the following exceptions:

15A NCAC 2D .1400 Rules: DENR/Environmental Management Commission - The Commission extended the period of review in order to give the Commission and all interested persons additional time for reviewing them. This time will be used to incorporate suggested technical changes as well as changes that might be considered more substantive into the draft of the proposed rules. This will then allow a more focused review on the remaining substantive issues of the rules.

19A NCAC 3D .0801: NC Department of Transportation – The rule was withdrawn by the agency.

19A NCAC 3J .0201: NC Department of Transportation – The Commission objected to the rule due to ambiguity. In (3)(a), it is not clear what would constitute “good moral character.” In (4)(f), it is not clear if a surety bond is required of all schools or only foreign schools.

19 NCAC 3J .0202: NC Department of Transportation - The Commission objected to the rule due to ambiguity. In (2), it is not clear what is meant by financial status.

19A NCAC 3J .0306: NC Department of Transportation – The rule was withdrawn by the agency.

19A NCAC 3J .0501: NC Department of Transportation – The Commission objected to the rule due to ambiguity. In (a)(4) and (b)(3), it is not clear what is meant by “relevant education training and experience as determined by the Division”. In (a)(5), it is not clear if the point total mentioned is cumulative for all years or only applies to points received in a 12-month period. In (a)(6) and (b)(4), it is not clear what is meant by “qualify by experience or training, or both, to instruct students in the safe operation of commercial motor vehicles.”

19A NCAC 3J .0502: NC Department of Transportation – The Commission objected to the rule due to ambiguity. In (3), it is not clear what evidence of high school graduation or equivalency is “satisfactory”.

19A NCAC 3J .0801: NC Department of Transportation – The Commission objected to the rule due to ambiguity. In (5), it is not clear what makes standards of instruction be “adequate”. It is also not clear how to determine if a course of instruction is performed adequately. In addition, it is not clear if “qualified instructors” means licensed instructors or something more.

19A NCAC 3J .0901: NC Department of Transportation – The Commission objected to the rule due to lack of statutory authority and ambiguity. There is no authority cited for setting occupational standards for recruiters. Specific authority is given to license instructors and to set character and reputation requirements for operators but there does not appear to be such authority for recruiters. In addition it is not clear what constitutes “good moral character” in (a)(1).

19A NCAC 3J .0902: NC Department of Transportation – The Commission objected to the rule due to lack of statutory authority and ambiguity. There is no authority cited for setting occupational standards for recruiters. Specific authority is given to license instructors and to set character and reputation requirements for operators but there does not appear to be such authority for recruiters. In addition, it is not clear what evidence of high school graduation or equivalency is “satisfactory”.

19A NCAC 3J .0903, .0904, .0906: NC Department of Transportation – The Commission objected to the rules due to lack of statutory authority. There is no authority cited for setting occupational standards for recruiters. Specific authority is given to license instructors and to set character and reputation requirements for operators but there does not appear to be such authority for recruiters.

25 NCAC 1C .0214: State Personnel Commission – The Commission voted to extend the period of review in order to give it time to determine if there is authority for the provision in (e) requiring a current or former state employee to file a written complaint and receive notification of remedial action prior to filing a contested case petition with the Office of Administrative Hearings.

25 NCAC 1J .0603: State Personnel Commission – The Commission voted to extend the period of review in order to give it time to determine if there is authority for the provision in (e) requiring an appeal of unlawful workplace harassment to be filed with the Office of Administrative Hearings within 30 calendar days of notification of remedial action.

### **COMMISSION PROCEDURES AND OTHER BUSINESS**

Staff Director, Joe DeLuca brought to the Commissioner’s attention the attachment to the travel reimbursement which lists what they can be reimbursed for and how much.

**RULES REVIEW COMMISSION**

Chairman Powell read in the record a letter to the Commission from the North Carolina Board of Ethics concerning Commissioner Jennie Hayman. The NC Board of Ethics found that Mrs. Hayman has no actual conflict of interest but does have the potential for conflict interest.

The next meeting will be on Thursday, September 20, 2001.

The meeting adjourned at 11:26 a.m.

Respectfully submitted,  
Lisa Johnson

**Commission Review/Administrative Rules**

*Log of Filings (Log #179)  
July 21, 2001 through August 20, 2001*

**DHHS**

Scope of Information and Assistance	10	NCAC	22L .0101	Amend
Eligibility for Information and Assistance	10	NCAC	22L .0201	Amend
Service Provision	10	NCAC	22L .0202	Adopt
Resource File	10	NCAC	22L .0202	Amend
Staff Competence	10	NCAC	22L .0203	Amend
Documentation	10	NCAC	22L .0204	Amend

**JUSTICE/CRIMINAL JUSTICE EDUCATION & TRAINING STANDARDS COMMISSION**

Definitions	12	NCAC	09A .0103	Amend
Minimum Standards for Correctional Officers	12	NCAC	09B .0107	Repeal
Minimum Standards for Probation/Parole Officers	12	NCAC	09B .0109	Repeal
Minimum Standards for Parole Case Analysts	12	NCAC	09B .0112	Repeal
Minimum Standards Probation/Parole Officer-Surv	12	NCAC	09B .0113	Repeal
Minimum Standards Probation/Parole Intensive Off	12	NCAC	09B .0115	Repeal
Basic Training Correctional Officers	12	NCAC	09B .0206	Repeal
Basic Training Probation/Parole Officers	12	NCAC	09B .0208	Repeal
Basic Training Parole Case Analysts	12	NCAC	09B .0216	Repeal
Basic Training Probation/Parole Officers Surv	12	NCAC	09B .0223	Repeal
Corrections Specialized Instructor Training Firearm	12	NCAC	09B .0229	Repeal
Specialized Instructor Certification	12	NCAC	09B .0304	Amend
Report of Appointment	12	NCAC	09C .0205	Amend
Application for Award of Professional Certificate	12	NCAC	09C .0207	Amend
Report of Separation	12	NCAC	09C .0208	Amend
Scope and Applicability of Subchapter	12	NCAC	09G .0101	Adopt
Definitions	12	NCAC	09G .0102	Adopt
Rule-Making and Administrative Hearing Procedures	12	NCAC	09G .0103	Adopt
Employment Process Documentation and Records Reten.	12	NCAC	09G .0201	Adopt
Citizenship	12	NCAC	09G .0202	Adopt
Age	12	NCAC	09G .0203	Adopt
Education	12	NCAC	09G .0204	Adopt
Physical and Mental Standards	12	NCAC	09G .0205	Adopt
Moral Character	12	NCAC	09G .0206	Adopt
Certification of Correctional Officers, Probation	12	NCAC	09G .0301	Adopt
Notification of Criminal Charges/Convictions	12	NCAC	09G .0302	Adopt
Probationary Certification	12	NCAC	09G .0303	Adopt
General Certification	12	NCAC	09G .0304	Adopt
Recertification Following Separation	12	NCAC	09G .0305	Adopt
Retention of Records of Certification	12	NCAC	09G .0306	Adopt
Certification of Instructors	12	NCAC	09G .0307	Adopt
General Instructor Certification	12	NCAC	09G .0308	Adopt
Terms of Conditions of General Instructor Cert	12	NCAC	09G .0309	Adopt
Specialized Instructor Certification	12	NCAC	09G .0310	Adopt
Terms and Conditions of Specialized Instructor Cer.	12	NCAC	09G .0311	Adopt
Instructor Certification Renewal	12	NCAC	09G .0312	Adopt

**RULES REVIEW COMMISSION**

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Corrections Instructor Training Course	12	NCAC	09G .0313	Adopt
Comprehensive Written Exam Instructor Training	12	NCAC	09G .0314	Adopt
Comprehensive Written Exam Specialized Instructor	12	NCAC	09G .0315	Adopt
Professional Lecturer Certification	12	NCAC	09G .0316	Adopt
Administration of Basic Corrections Training School	12	NCAC	09G .0401	Adopt
Accreditation of Corrections Schools	12	NCAC	09G .0402	Adopt
Accreditation of Training Courses	12	NCAC	09G .0403	Adopt
Pilo Course Presentation/Participation	12	NCAC	09G .0404	Adopt
Certification of Schools Directors	12	NCAC	09G .0405	Adopt
Terms and Conditions of School Director Cert	12	NCAC	09G .0406	Adopt
Suspension Revocation Denial/School Director Cert	12	NCAC	09G .0407	Adopt
Responsibilities of the School Director	12	NCAC	09G .0408	Adopt
Admission of Trainees and Course Enrollment	12	NCAC	09G .0409	Adopt
Waiver of Completion of Training	12	NCAC	09G .0410	Adopt
Basic Training for Correctional Officers	12	NCAC	09G .0411	Adopt
Basic Training for Probation/Parole Officers	12	NCAC	09G .0412	Adopt
Basic Training for Probation/Parole Officers Surv.	12	NCAC	09G .0413	Adopt
Instructor Training	12	NCAC	09G .0414	Adopt
Corrections Specialized Instructor Training Firearm	12	NCAC	09G .0415	Adopt
Corrections Specialized Instructor Training Unarm	12	NCAC	09G .0416	Adopt
Investigation of Violation of Rules	12	NCAC	09G .0501	Adopt
Sanctions for Violations by Agencies of Schools	12	NCAC	09G .0502	Adopt
Sanctions for Violations by Individuals	12	NCAC	09G .0503	Adopt
Suspension Revocation or Denial of Certification	12	NCAC	09G .0504	Adopt
Period of Suspension Revocation or Denial	12	NCAC	09G .0505	Adopt
Summary Suspensions	12	NCAC	09G .0506	Adopt
Purpose	12	NCAC	09G .0601	Adopt
General Provisions	12	NCAC	09G .0602	Adopt
Basic State Corrections Certificate	12	NCAC	09G .0603	Adopt
Intermediate State Corrections Certificate	12	NCAC	09G .0604	Adopt
Advanced State Corrections Certificate	12	NCAC	09G .0605	Adopt
Method of Application	12	NCAC	09G .0606	Adopt
Report Application and Certificate Forms	12	NCAC	09G .0701	Adopt
<b>DENR/COASTAL RESOURCES COMMISSION</b>				
Buffer Exceptions	15	NCAC	07H .0209	Amend
Oceanfront Setback Exceptions	15	NCAC	07H .0309	Amend
Accessory Building Definitions	15	NCAC	07K .0209	Amend
High Hazard Flood AEC	15	NCAC	07K .0213	Amend
<b>TRANSPORTATION, DEPARTMENT OF/DIVISION OF MOTOR VEHICLES</b>				
Safety of Operation and Equipment	19	NCAC	03D .0801	Amend
Course of Instruction	19	NCAC	03J .0306	Amend
<b>STATE BOARDS/N C ACUPUNCTURE LICENSING BOARD</b>				
Standards for Continuing Education	21	NCAC	01 .0301	Amend
<b>STATE BOARDS/DENTAL EXAMINERS, BOARD OF</b>				
Definition: Unprofessional Conduct by a Dentist	21	NCAC	16V .0101	Amend
Definition: Unprofessional Conduct by a Dental Hyg	21	NCAC	16V .0102	Amend
<b>STATE BOARDS/N C MEDICAL BOARD</b>				
Clinical Pharmacist Practitioner	21	NCAC	32T .0101	Amend
<b>STATE BOARDS/N C BOARD OF PHARMACY</b>				
Clinical Pharmacist Practitioner	21	NCAC	46 .3101	Amend

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**AGENDA**  
**RULES REVIEW COMMISSION**  
**September 20, 2001**

- (I) Call to Order and Opening Remarks
- (II) Review of minutes of last meeting
- (III) Follow Up Matters

***RULES REVIEW COMMISSION***

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- A. Department of Cultural Resources – 7 NCAC 4S .0104 Objection on 12/21/00 (DeLuca)
- B. DHHS/Commission for MH/DD/SAS – 10 NCAC 45H .0203 and .0204 Objection on 6/21/01 (DeLuca)
- C. DENR/Environmental Management Commission – 15A 2D .1401; .1402; .1403; .1406; .1408; .1419; .1410; .1411; .1412; .1413; .1414; .1415; .1416; .1417; .1418; .1419; .1420; .1421; .1422; .1423 Extend Period of Review on 8/16/01 (DeLuca)
- D. Commission for Health Services – 15A NCAC 18A .3334 Objection on 04/19/01; 07/19/01 (Bryan)
- E. NC Department of Transportation – 19A NCAC 3J.0201, .0202, .0501, .0502,.0801, .0901, .0902, .0903, .0904, .0906 Objection on 8/16/01 (Bryan)
- F. State Personnel Commission – 25 NCAC 1C .0214 Extend Period of Review on 8/16/01 (Bryan)
- G. State Personnel Commission – 25 NCAC 1J .0603 Extend Period of Review on 8/16/01

- (IV) Review of rules (Log Report #179)
- (V) Commission Business
- (VI) Next meeting: Thursday, October 18, 2001

## CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at the following address: <http://www.ncoah.com/hearings>.

### OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge*

*JULIAN MANN, III*

*Senior Administrative Law Judge*

*FRED G. MORRISON JR.*

### ADMINISTRATIVE LAW JUDGES

*Sammie Chess Jr.*

*Beecher R. Gray*

*Melissa Owens Lassiter*

*James L. Conner, II*

*Beryl E. Wade*

*A.B. (Butch) Elkins*

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOL BEVERAGE CONTROL COMMISSION</u></b>				
C's Mini-Mart, Camille Stephens v. NC ABC Commission and City of Charlotte	00 ABC 1264	Lassiter	06/08/01	
NC ABC Commission v. Benjamin Franklin Black, B and M Convenience	01 ABC 0663	Morrison	07/23/01	
<b><u>BOARD OF MORTUARY SCIENCE</u></b>				
NC Board of Mortuary Science v. Beasley's Funeral Home, Inc., Odell Beasley, Crystal Beasley-Walker	00 BMS 0469	Mann	07/17/01	
<b><u>BOARD OF GEOLOGISTS</u></b>				
O. Phillip Kimbrell, P.G. v. NC Board for the Licensing of Geologists	99 BOG 1254	Conner	05/29/01	
<b><u>BOARD OF MORTUARY SCIENCE</u></b>				
Board of Mortuary Science v. Hunter Funeral Home & Julius Hunter	00 BMS 0505	Reilly	11/01/00	
<b><u>CRIME CONTROL AND PUBLIC SAFETY</u></b>				
Jerry W. Taylor v. NC Victims Compensation Commission	00 CPS 1052	Gray	05/23/01	
Sheree D Sirotnak v. NC Crime Victims Compensation Commission	00 CPS 2209	Wade	06/14/01	
Eddie N McLaughlin v. NC Crime Victims Compensation Commission	01 CPS 0086	Elkins	06/05/01	
<b><u>HEALTH AND HUMAN SERVICES</u></b>				
David P. Lemieux v. Department of Health & Human Services	01 CRA 0428	Gray	06/05/01	
Gerald Pelletier III v. Department of Health & Human Services	01 CRA 0882	Morrison	07/19/01	
Anthony B Smalling v. Department of Health & Human Services	01 CRA 0993	Conner	08/07/01	
<b><i>Child Support Enforcement Section</i></b>				
John F McCollum v. Department of Health & Human Services	00 CSE 0252	Gray	07/18/01	
Bickett Fort v. Department of Health & Human Services	00 CSE 1169	Mann	08/10/01	
David K. Rose v. Department of Health & Human Services	00 CSE 1681	Gray	06/05/01	
John T McDonald v. Department of Health & Human Services	00 CSE 1687	Wade	06/08/01	
Willie E Harris v. Department of Health & Human Services	00 CSE 1742	Morrison	07/26/01	
William Baxter v. Department of Health & Human Services	00 CSE 1776	Wade	05/30/01	
Albert Hooks Jr. v. Department of Health & Human Services	00 CSE 1798	Lassiter	07/30/01	
Manargo Victor Boykin v. Department of Health & Human Services	00 CSE 1835 <sup>1</sup>	Wade	05/30/01	
Manargo Victor Boykin v. Department of Health & Human Services	00 CSE 1837 <sup>1</sup>	Wade	05/30/01	
Larry W Kiser v. Department of Health & Human Services	00 CSE 1840	Gray	06/08/01	
Jason Parker v. Department of Health & Human Services	00 CSE 1853	Morrison	08/02/01	
Michael A Gresham Sr. v. Department of Health & Human Services	00 CSE 1862	Gray	06/28/01	
Michael N Brack v. Department of Health & Human Services	00 CSE 1904	Lassiter	07/02/01	
Gregory C McCauley v. Department of Health & Human Services	00 CSE 1915	Wade	08/03/01	
Raymond N Strother v. Department of Health & Human Services	00 CSE 1910	Gray	07/18/01	
Donald E Scott v. Department of Health & Human Services	00 CSE 1919	Chess	08/08/01	
Robert Steven Preston v. Department of Health & Human Services	00 CSE 1958	Lassiter	06/05/01	
John R Pyron v. Department of Health & Human Services	00 CSE 1960	Wade	08/10/01	
Richard Stevens Jr. v. Department of Health & Human Services	00 CSE 1965	Morrison	08/07/01	
Bobby R. Mayo v. Department of Health & Human Services	00 CSE 1969	Conner	07/09/01	
Steven Gregory Hotz v. Department of Health & Human Services	00 CSE 1978	Chess	07/24/01	
William Kay v. Department of Health & Human Services	00 CSE 2060	Conner	07/20/01	
Patrick L Merrick v. Department of Health & Human Services	00 CSE 2061	Chess	07/12/01	

**CONTESTED CASE DECISIONS**

Jerome Maddox v. Department of Health & Human Services	00 CSE 2153	Wade	08/07/01
Winston H Powell v. Department of Health & Human Services	00 CSE 2274	Wade	05/30/01
Kendall L Taylor v. Department of Health & Human Services	00 CSE 0032	Conner	06/08/01
Sue Diane Lambert v. Department of Health & Human Services	01 CSE 0069	Wade	07/13/01
Michael Jarvis v. Department of Health & Human Services	01 CSE 0173	Wade	08/06/01
Samuel E Taylor v. Department of Health & Human Services	01 CSE 0181	Conner	06/08/01
Randall Blevins v. Department of Health & Human Services	01 CSE 0258	Gray	06/05/01
Jason O Smith v. Department of Health & Human Services	01 CSE 0266	Mann	07/19/01
Richard Brooks v. Department of Health & Human Services	01 CSE 0269	Wade	06/25/01
Carey Austin Spencer v. Department of Health & Human Services	01 CSE 0277	Conner	07/09/01
Ronnie William Foster v. Department of Health & Human Services	01 CSE 0280	Chess	07/09/01
Craig Darrell McLeod v. Department of Health & Human Services	01 CSE 0301	Gray	07/31/01
Nathaniel Gunter v. Department of Health & Human Services	01 CSE 0333	Morrison	06/25/01
Cantabile Jones v. Department of Health & Human Services	01 CSE 0357	Chess	07/06/01
Arlene Locklear v. Department of Health & Human Services	01 CSE 0358	Conner	07/20/01
Nolan D Schrader v. Department of Health & Human Services	01 CSE 0362	Elkins	08/07/01
Harvey L Hughes Sr. v. Department of Health & Human Services	01 CSE 0366	Gray	06/29/01
Denise Renee Nunn v. Department of Health & Human Services	01 CSE 0368	Morrison	06/05/01
Eric L Woody v. Department of Health & Human Services	01 CSE 0387	Wade	08/10/01
Gilbert Monk v. Department of Health & Human Services	01 CSE 0390	Lassiter	07/02/01
David L Trammel Jr. v. Department of Health & Human Services	01 CSE 0391	Chess	06/26/01
Ralph A Terry v. Department of Health & Human Services	01 CSE 0405	Gray	06/29/01
Johnny Caldwell v. Department of Health & Human Services	01 CSE 0415	Conner	07/09/01
Timothy Ray Ledford v. Department of Health & Human Services	01 CSE 0416	Elkins	06/29/01
Leon B Featherson v. Department of Health & Human Services	01 CSE 0423	Wade	08/10/01
Robert Griffin v. Department of Health & Human Services	01 CSE 0430	Morrison	07/02/01
Dennis E Chardavoyne v. Department of Health & Human Services	01 CSE 0432	Elkins	06/05/01
Luther W Covington v. Department of Health & Human Services	01 CSE 0438	Conner	07/20/01
Carl Franklin Slemph v. Department of Health & Human Services	01 CSE 0449	Morrison	07/12/01
Tennis Lee Perry v. Department of Health & Human Services	01 CSE 0450	Chess	07/06/01
Richard E Roberts Jr. v. Department of Health & Human Services	01 CSE 0461	Wade	07/12/01
David Wilson v. Department of Health & Human Services	01 CSE 0463	Conner	07/20/01
Henry L Elliotte v. Department of Health & Human Services	01 CSE 0491	Lassiter	06/05/01
Gregory Morgan v. Department of Health & Human Services	01 CSE 0498	Elkins	05/24/01
Malik J Flamer v. Department of Health & Human Services	01 CSE 0501	Wade	07/12/01
John Winstead v. Department of Health & Human Services	01 CSE 0562	Conner	06/08/01
Raymond A McDonald v. Department of Health & Human Services	01 CSE 0592	Gray	07/18/01
Carson C Clark Jr. v. Department of Health & Human Services	01 CSE 0600	Morrison	07/19/01
Paul Williams v. Department of Health & Human Services	01 CSE 0606	Lassiter	07/19/01
Thomas J Lippa v. Department of Health & Human Services	01 CSE 0609	Elkins	06/27/01
Boyd H Tucker v. NC Child Support Centralized Collection	01 CSE 0618	Wade	05/31/01
Joseph E Rudd Jr. v. Department of Health & Human Services	01 CSE 0621	Gray	05/29/01
Manuel Lee Thomas v. Department of Health & Human Services	01 CSE 0623	Morrison	07/19/01
Kirk M White v. Department of Health & Human Services	01 CSE 0625	Lassiter	06/05/01
Walter L Sloan Jr. v. Department of Health & Human Services	01 CSE 0626	Wade	08/03/01
Kevin R Ross v. Department of Health & Human Services	01 CSE 0631	Elkins	06/05/01
Kelvin R Leonard v. Department of Health & Human Services	01 CSE 0633	Elkins	06/05/01
Steven Rodger Malysz v. Department of Health & Human Services	01 CSE 0649	Gray	06/05/01
Forrest W Crutchfield v. Department of Health & Human Services	01 CSE 0651	Morrison	08/02/01
Raul Villanueva v. Department of Health & Human Services	01 CSE 0652	Morrison	08/02/01
Allen Getzinger v. Department of Health & Human Services	01 CSE 0654	Lassiter	08/08/01
Robert Lee Scott Jr. v. Department of Health & Human Services	01 CSE 0656	Conner	07/20/01
Christopher R Miller v. Department of Health & Human Services	01 CSE 0678	Lassiter	07/19/01
Larry O Anthony v. Department of Health & Human Services	01 CSE 0681	Lassiter	07/30/01
Dennis Green v. Department of Health & Human Services	01 CSE 0682	Gray	08/02/01
Lynn S Jowers v. Department of Health & Human Services	01 CSE 0688	Elkins	06/25/01
Charles John DaBella v. Department of Health & Human Services	01 CSE 0690	Conner	07/20/01
Kou Yang v. Department of Health & Human Services	01 CSE 0692	Gray	08/02/01
George D Moore v. Department of Health & Human Services	01 CSE 0693	Wade	08/03/01
Anthony C Lambert v. Department of Health & Human Services	01 CSE 0696	Morrison	07/11/01
Benjamin R Norris v. Department of Health & Human Services	01 CSE 0698	Lassiter	07/30/01
Joshua V Harris v. Department of Health & Human Services	01 CSE 0757	Morrison	07/30/01
Jeffery D Bolton v. Department of Health & Human Services	01 CSE 0777	Gray	06/29/01
Leonard A Warren v. Department of Health & Human Services	01 CSE 0817	Morrison	07/13/01
Dennis D Miller v. Department of Health & Human Services	01 CSE 0824	Elkins	07/31/01
Michelle Dalton Painter v. Department of Health & Human Services	01 CSE 0838	Chess	07/09/01
James D Jackson Jr. v. Department of Health & Human Services	01 CSE 0839	Gray	07/31/01
Linda N Dixon v. Department of Health & Human Services	01 CSE 0844	Lassiter	08/08/01
Arthur Jackson v. Department of Health & Human Services	01 CSE 0872	Chess	07/25/01
Calvin Laverne Johnson v. Department of Health & Human Services	01 CSE 0886	Lassiter	07/26/01
Jacqueline Land v. Department of Health & Human Services	01 CSE 0897	Elkins	07/17/01
Thomas E Mitchell v. Department of Health & Human Services	01 CSE 0901	Elkins	08/07/01
Joseph L Garland v. Department of Health & Human Services	01 CSE 0991	Wade	08/10/01
James W Quick v. Department of Health & Human Services	01 CSE 1044	Conner	08/07/01
Elijah Saunders v. Department of Health & Human Services	01 CSE 1052	Gray	08/02/01
Bobby D Cooper v. Department of Health & Human Services	01 CSE 1087	Wade	08/10/01
Constance Drye v. Department of Health & Human Services	01 DCS 0707	Wade	06/25/01
LaVonya Ann Goods v. Department of Health & Human Services	01 DCS 0819	Lassiter	07/12/01
Faye D Brown v. Department of Health & Human Services	01 DCS 0923	Lassiter	07/19/01
Sheree R Jenkins v. Department of Health & Human Services	01 DCS 1051	Chess	07/24/01

**CONTESTED CASE DECISIONS**

**CULTURAL RESOURCES**

Howard W & Rebecca Hoover v. NC Dept. of Cultural Resources 01 DCR 0243 Wade 06/26/01  
 State Historic Preservation Office

**HEALTH AND HUMAN SERVICES**

Kenneth E. Frost v. DHHS, Julian F. Keith, ADATC 00 DHR 2278 Conner 07/30/01  
 Ruby L. Laughter v. Dept. of Health & Human Services 01 DHR 0108 Gray 06/29/01  
 Renita Lewis-Walters v. (ADATC), Dept. of Health & Human Services 01 DHR 0286 Morrison 06/08/01  
 Thomas M Poole v. Dept. of Health & Human Services 01 DHR 0335 Lassiter 07/26/01  
 Duane E McCoyle v. DHHS, Broughton Hospital 01 DHR 0398 Wade 06/19/01  
 Lara Beth Henrick v. DHHS, Dorothea Dix Hospital 01 DHR 0409 Mann 07/19/01  
 Terry W Hartsoe v. NC Dept. of Health & Human Services 01 DHR 0420 Chess 07/06/01  
 Richard L Foster, Reansia M Foster v. DHHS, Broughton Hospital 01 DHR 0454 Wade 06/25/01  
 Yvonne D Cole v. Cherry Hospital, Brenda Wells 01 DHR 0502 Morrison 07/23/01  
 Cheryl Holloway v. DHHS, Health Care Register 01 DHR 0513 Morrison 07/27/01  
 Adam Query Fisher, Jr. v. DHHS, Julian F Keith, ADATC 01 DHR 0559 Wade 06/19/01  
 Dennis E Partridge v. DHHS, Julian F Keith, ADATC 01 DHR 0560 Wade 06/19/01  
 Robert & Shirley Harmon on behalf of Gary Harmon v. NC DMH/DD/SAS 01 DHR 0955 Chess 06/25/01  
 Eric L Belton v. Dept. of Health & Human Services, ADATC 01 DHR 0610 Lassiter 06/04/01  
 Charles Anthony Tart v. DHHS, Walter B Jones, ADATC 01 DHR 0665 Lassiter 06/22/01  
 Calvin Lucas v. Butner Alcohol & Drug Abuse Treatment Center 01 DHR 0738 Morrison 07/02/01  
 Mollie Williams v. Dept. of Health & Human Services 01 DHR 0753 Conner 07/10/01  
 Fannie Brown v. Caswell Center Healthcare Personnel Registry 01 DHR 0780 Gray 07/02/01  
 Edward D Connor v. Dept. of Health & Human Services 01 DHR 0978 Chess 07/05/01  
 Portia A Davis v. Dept. of Health & Human Services 01 DHS 1055 Mann 08/06/01

***Division of Child Development***

Vickie L. Anderson, Camelot Academy v. DHHS, Division of Child Development 00 DHR 1270 Wade 05/22/01

***Division of Medical Assistance***

Littleton Pharmacy, Inc. James A King v. DHHS, Division of Medical Assistance, Mary J Coward 01 DHR 0835 Conner 07/12/01  
 Dr. Mitchell James Lequire, PharmD Realo Drug v. DHHS, Division of Medical Assistance 01 DHR 0989 Chess 07/12/01

***Division of Facility Services***

Donna Kay Pittman v. DHHS, Division of Facility Services 00 DHR 0086 Overby 06/29/01  
 Linda Gail Funke v. DHHS, Division of Facility Services 00 DHR 0625 Wade 06/04/01  
 Audrey E Alston v. DHHS, Division of Facility Services 00 DHR 1017 Gray 06/14/01  
 David Mull v. DHHS, Division of Facility Services 00 DHR 1495 Lassiter 06/12/01  
 Ethlyne Phipps v. DHHS, Division of Facility Services 00 DHR 1505 Conner 07/26/01  
 Yelton's Healthcare, Inc. v. DHHS, Division of Facility Services 00 DHR 1540 Chess 06/21/01  
 Jacqueline A Alexander v. DHHS, Division of Facility Services 00 DHR 1586 Gray 06/28/01  
 Debra Brown v. DHHS, Division of Facility Services 00 DHR 2009 Gray 06/28/01  
 Dana McQueen v. DHHS, Division of Facility Services 00 DHR 2261 Elkins 06/27/01  
 Peter Lynn Mosher v. DHHS, Division of Facility Services 01 DHR 0178 Mann 05/30/01  
 Samuel McKinley Tugman v. DHHS, Division of Facility Services 01 DHR 0512 Gray 07/25/01  
 Keysha Lynn Ragas v. DHHS, Division of Facility Services 01 DHR 0214 Wade 06/28/01  
 Davina Brook Grant v. DHHS, Division of Facility Services 01 DHR 0363 Conner 06/08/01  
 Tara Livingston v. DHHS, Division of Facility Services 01 DHR 0667 Conner 06/26/01  
 Arlene E Jackson v. DHHS, Division of Facility Services 01 DHR 0740 Morrison 07/11/01  
 Genevieve McLean v. DHHS, Division of Facility Services 01 DHR 0808 Lassiter 07/03/01  
 Daphne Michelle Pressley v. DHHS, Division of Facility Services 01 DHS 0863 Morrison 07/27/01  
 Candice J Smith v. DHHS, Division of Facility Services 01 DHS 0911 Lassiter 07/27/01

***Division of Social Services***

Delie L. Anthony v. Edgecombe Co. Dept. of Social Services Child Abuse and Neglect Dept. Tarsha McCray 01 DHR 0324 Wade 06/18/01  
 Angel McDowell v. Office of Administrative Hearings 01 DHR 0370 Conner 06/05/01  
 Kristie N Crabtree v. Greene County Social Services 01 DHR 0401 Lassiter 06/05/01  
 Claire Diggs v. DHHS, Moore Co. Dept. of Social Services 01 DHR 0551 Elkins 08/02/01  
 Elizabeth Jackson v. DHHS, Dept. of Social Services 01 DHR 0601 Lassiter 06/22/01  
 John H Anderson v. Bladen County Dept. of Social Services 01 DHR 0605 Morrison 06/22/01  
 Kishja Marlin v. NC DHHS, Social Svcs. Program Integrity Section 01 DHR 0634 Elkins 07/11/01

**JUSTICE**

Deona Renna Hooper v. Co. Police Program, Co. Police Administrator 00 DOJ 2177 Wade 06/22/01

***Alarm Systems Licensing Board***

Edward James Summers v. Alarm Systems Licensing Board 01 DOJ 0352 Morrison 06/13/01  
 Joseph Brian Moses v. Alarm Systems Licensing Board 01 DOJ 0582 Wade 06/01/01  
 Arthur Eugene Corpening v. Alarm Systems Licensing Board 01 DOJ 0789 Morrison 06/13/01  
 Donny Lamor Phillips v. Alarm Systems Licensing Board 01 DOJ 0997 Lassiter 07/24/01  
 Stephen Wayne Farmer v. Alarm Systems Licensing Board 01 DOJ 0998 Lassiter 07/24/01

***Private Protective Services Board***

Linda Morton Kiziah v. Private Protective Services Board 01 DOJ 0353 Wade 06/01/01  
 Willie Carl Wilson v. Private Protective Services Board 01 DOJ 0580 Morrison 06/04/01  
 Adonte Mekail Macon v. Private Protective Services Board 01 DOJ 0999 Lassiter 07/05/01

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Calvin McNair v. Private Protective Services Board	01 DOJ 1000	Lassiter	07/03/01		
<b><u>Sheriffs' Education &amp; Training Standards Commission</u></b>					
Larry Russell Jackson v. NC Criminal Justice & Trng. Stds. Comm.	00 DOJ 0721	Gray	07/20/01		
Joshua Craig Brothers v. NC Sheiffs' Educ. & Trng. Stds. Comm.	00 DOJ 1558	Elkins	06/12/01		
<b><u>DEPARTMENT OF STATE TREASURER</u></b>					
Gwen A Lindsey v. Timothy S Bryan, State of NC, Dept. of State Treasurer, Retirement Systems	00 DST 0727	Mann	08/06/01		
Bruce E. Colvin v. Board of Trustees of the Local Governmental Employees' Retirement System	00 DST 0776	Gray	07/06/01	16:04 NCR	384
<b><u>ENVIRONMENT AND NATURAL RESOURCES</u></b>					
Leahman Coday, Jr. v. NC DENR	99 EHR 1651	Wade	06/21/01		
David T. Stephenson, owner, John P. Williams, Agent, Lot 86 v. NC DENR (Brunswick County Health Department)	00 EHR 0769 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
Anson County Citizens Against Chemical Toxins in Underground Storage, Blue Ridge Environmental Defense League, Inc., Mary Gaddy, Bobby Smith and Emma Smith v. DENR	00 EHR 0938	Conner	06/05/01	16:01 NCR	40
Acreage Brokers, Inc., Doug Golightly, Officer, James T. Gulley Jr., (Agent) v. NC DENR (Brunswick County Health Department)	00 EHR 1214 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
Albert Galluzzo, James T. Gulley, Jr. (Agent) v. NC DENR	00 EHR 1245 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 62 v. NC DENR (Brunswick County Health Department)	00 EHR 1249 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 65 v. NC DENR (Brunswick County Health Department)	00 EHR 1250 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 64 v. NC DENR (Brunswick County Health Department)	00 EHR 1251 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 69 +1/2 68 v. NC DENR, (Brunswick County Health Department)	00 EHR 1252 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR, (Brunswick County Health Dept.)	00 EHR 1253 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 90 v. NC DENR, (Brunswick County Health Department)	00 EHR 1254 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 66 v. NC DENR (Brunswick County Health Department)	00 EHR 1255 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR, Lot 66					
Sammie Williams and Williams Seafood, Inc. v. NC DENR, Division of Coastal Management	00 EHR 1288	Gray	08/02/01	16:05 NCR	484
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1876 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1877 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1878 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1879 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1880 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1881 <sup>1</sup>	Gray	08/07/01	16:05 NCR	463
Paul J Williams v. NC Dept.of Env. Man. Comm. and Keith Overcash, PE Deputy Director	01 EHR 0212	Lassiter	07/12/01		
Laura Walters v. Environmental Management Commission	01 EHR 0230	Lassiter	07/19/01		
Brandon H Clewis, Christy Swails Clewis v. Chatham County Health Dept., Office of Environmental Health	01 EHR 0305	Lassiter	06/04/01		
M/I Homes, Donald Fraley v. Durham County	01 EHR 0687	Conner	07/10/01		
Marc P Walch v. Haywood Co. Health Dept. c/o Daniel F McLawhorn NC DENR	01 EHR 0730	Morrison	06/26/01		
Richard W Brannock v. NC DENR, Div. of Waste Management	01 EHR 0767	Elkins	07/30/01		
Billy James Miller, Jr., Peggy Matthews Miller v. NC Dept. of Health/ Environmental Health Inspections, John Stucky (Inspector)	01 EHR 0934	Elkins	08/02/01		
<b><u>ENGINEERS AND LAND SURVEYORS</u></b>					
NC Bd. of Examiners for Engineers and Surveyors v. C. Phil Wagoner	01 ELS 0078	Overby	07/11/01		
<b><u>HUMAN RELATIONS COMMISSION</u></b>					
NC Human Relations Commission on behalf of Jeanette Guffey and Harvey Myers	99 HRC 1383	Wade	08/06/01		
<b><u>DEPARTMENT OF INSURANCE</u></b>					
Wellpath Select, Inc. v. NC Teachers' & State Employees' Comp.	01 INS 0388	Morrison	07/03/01		
<b><u>MISCELLANEOUS</u></b>					
Tony L. Arnett v. Administrative Office of the Courts	00 MIS 0424	Wade	06/26/01		
<b><u>OFFICE OF STATE PERSONNEL</u></b>					
Debbie Whitley v. Wake County Department of Health	96 OSP 1997	Chess	05/22/01		
Larry R Lane v. NC DOT, G.F. Neal, Cty. Maintenance Engineer	99 OSP 0105	Lassiter	07/16/01		
Timothy Ramey v. NC Department of Correction	99 OSP 1085	Chess	06/27/01		
Miriam Dukes v. Albemarle Mental Health Center Bd. of Directors	00 OSP 0234	Wade	05/22/01		
Angela Ellen Jones v. Mr. Weldon Freeman, Personnel Director, NC Dept. of Crime Control & Public Safety	00 OSP 0345	Lassiter	07/03/01		
A. Mark Esposito v. Dept. of Transportation	00 OSP 1333	Gray	06/13/01		
Bobbie D Sanders v. UNC-CH	00 OSP 1806	Chess	06/21/01	16:03 NCR	271
Robert J Lane v. NC Department of Correction, Central Engineering	00 OSP 1841	Elkins	06/26/01		

<sup>1</sup> Combined Cases

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Natalynn P. Tollison v. NCSU <i>et al</i>	00 OSP 1909	Wade	06/01/01
Jerrelle B Jones v. DHHS, O'Berry Center	01 OSP 0003	Lassiter	06/26/01
Kit Locklear v. NC Department of Correction	01 OSP 0106	Elkins	07/17/01
Andrew E Chambers v. NC Department of Corrections	01 OSP 0172	Morrison	07/12/01
Lonnie Sessions v. Columbus Correction Inst.	01 OSP 0240	Gray	05/23/01
Lee Woodburn v. NC State University	01 OSP 0275	Lassiter	06/21/01
Jamel O. Frazier v. NC Department of Transportation	01 OSP 0334	Anderson	07/06/01
Arlene R. Burwell v. Warren Correctional Institute	01 OSP 0448	Mann	07/18/01
Lisa Scopee Lewis v. Carteret Correctional Facility	01 OSP 0801	Gray	07/17/01
William David Fox v. NC Department of Transportation	01 OSP 0853	Morrison	07/02/01
John A Smith v. Department of Corrections, State of NC	01 OSP 0984	Chess	07/25/01
Faith J Jackson v. NC Department of Correction	01 OSP 0986	Lassiter	07/12/01
Calvia Lynn Hill v. Lumberton Correctional Inst., DOC	01 OSP 1205	Conner	08/07/01

**UNIVERSITY OF NORTH CAROLINA**

Tammie Davis v. UNC Hospitals & UNC Physicians	01 UNC 0506	Mann	07/13/01
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CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF BRUNSWICK

David T. Stephenson, Owner, )  
John P. Williams, Agent, )  
Lot 86 )  
Petitioner, )  
v. )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 0769

RECOMMENDED DECISION

David T. Stephenson, )  
Lot 62 )  
Petitioner, )  
v. )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1249

RECOMMENDED DECISION

David T. Stephenson, )  
Lot 65 )  
Petitioner, )  
v. )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1250

RECOMMENDED DECISION

David T. Stephenson, )  
Lot 64 )  
Petitioner, )  
v. )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1251

RECOMMENDED DECISION

David T. Stephenson, )  
Lot 69 + 1/2 68 )  
Petitioner, )  
v. )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1252

RECOMMENDED DECISION

**CONTESTED CASE DECISIONS**

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David T. Stephenson, )  
Petitioner, )  
 )  
v. )  
 )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1253

RECOMMENDED DECISION

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David T. Stephenson, )  
Lot 90 )  
Petitioner, )  
 )  
v. )  
 )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1254

RECOMMENDED DECISION

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David T. Stephenson, )  
Lot 66 )  
Petitioner, )  
 )  
v. )  
 )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1255

RECOMMENDED DECISION

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David T. Stephenson, )  
Petitioner, )  
 )  
v. )  
 )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1876

RECOMMENDED DECISION

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David T. Stephenson, )  
Petitioner, )  
 )  
v. )  
 )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1877

RECOMMENDED DECISION

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David T. Stephenson, )  
Petitioner, )  
 )  
v. )  
 )  
N.C. Department of Environment and Natural Resources )  
(Brunswick County Health Department) )  
Respondent. )

00 EHR 1878

RECOMMENDED DECISION

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**CONTESTED CASE DECISIONS**

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David T. Stephenson, Petitioner,	)	00 EHR 1879
	)	
v.	)	RECOMMENDED DECISION
	)	
N.C. Department of Environment and Natural Resources (Brunswick County Health Department) Respondent.	) ) )	

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David T. Stephenson, Petitioner,	)	00 EHR 1880
	)	
v.	)	RECOMMENDED DECISION
	)	
N.C. Department of Environment and Natural Resources (Brunswick County Health Department) Respondent.	) ) )	

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David T. Stephenson, Petitioner,	)	00 EHR 1881
	)	
v.	)	RECOMMENDED DECISION
	)	
N.C. Department of Environment and Natural Resources (Brunswick County Health Department) Respondent.	) ) )	

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Acreage Brokers, Inc., Doug Golightly Officer, James T. Gulley, Jr. (Agent) Petitioner,	)	00 EHR 1214
	)	
v.	)	RECOMMENDED DECISION
	)	
N.C. Department of Environment and Natural Resources (Brunswick County Health Department) Respondent.	) ) )	

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Albert Galluzzo, James T. Gulley, Jr. (Agent) Petitioner,	)	00 EHR 1245
	)	
v.	)	RECOMMENDED DECISION
	)	
N.C. Department of Environment and Natural Resources (Brunswick County Health Department) Respondent.	) ) )	

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**PROCEDURAL HISTORY**

This matter came on for hearing before Administrative Law Judge Beecher R. Gray, on February 13-14, 2001, in Southport, North Carolina and on March 27, 2001, in Farmville, North Carolina.

The original action consisted of sixteen separate contested cases regarding applications for improvement permits: fourteen petitions were filed by Tom Stephenson; one petition was filed by Albert Galluzzo and James T. Gulley, Land Management Group and one petition was filed by Acreage Brokers and James T. Gulley, Land Management Group. Each petition alleged in exactly the same language that the N.C. Department of Environment and Natural Resources "Failed to follow recognized principles and practices of soil science, geology, engineering, and public health as mandated in Rule .1964(a)." Petitioners contend that Respondent essentially amended Rule .1942, as applied to the sites in question in Petitioners' petitions, by changing it from a chroma 2 standard to a direct observation measurement without going through rulemaking as required by the Administrative Procedures Act, Chapter 150B of the General Statutes of North Carolina. All of the contested cases concern sites with drainage modifications, except Acreage, 00 EHR 1214, which is an undrained site. Respondent's Exhibits 15A-15N.

There were two separate petitions to consolidate the cases. On September 8, 2000, Respondent filed a petition to consolidate eight contested cases filed by David Stephenson. The petition to consolidate was granted by order of the Chief Administrative Law Judge Julian Mann, III, dated October 2, 2000. On November 30, 2000, after the filing of six new petitions by Petitioner Stephenson and two petitions stating exactly the same claims by Acreage Brokers and Albert Galluzzo, the parties filed a joint petition to consolidate the newly-filed cases with the previously-consolidated cases. The second petition to consolidate was granted by order of the Chief Administrative Law Judge Julian Mann, III, on January 5, 2001.

At a pre-trial hearing, Respondent moved that the Court dismiss three of the Stephenson petitions, 00 EHR 0769, lot 86, Hunter's Ridge Subdivision; 00 EHR 1879, lot 87, Hunter's Ridge; and 00 EHR 1880, lot 88, Hunter's Ridge, on the basis that Brunswick County had approved permits for both a shallow conventional wastewater system (with a drainage modification in lot 86, 00 EHR 0769), and a low pressure pipe wastewater system in each of those cases. Petitioner opposed dismissal of 00 EHR 0769, based in part on the fact that he had retained an expert to examine that site. Petitioner stipulated to dismissal of the other two contested cases. (T p. 24, lines 23-25) The motion was denied as to 00 EHR 0769; the motion was granted as to 00 EHR 1879 and 00 EHR 1880.

**APPEARANCES**

For Petitioners:           Michael F. McCulley, Jr., Esq.  
New Bern, North Carolina

For Respondent:           Elizabeth L. Oxley, Assistant Attorney General  
North Carolina Dept. of Justice, Raleigh, N. C.

**ISSUES**

Whether Respondent substantially prejudiced Petitioners' rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule when it denied improvement permits for the lots identified in the consolidated petitions on the basis of direct observation of the monitoring well water levels 48 hours following a rainfall event, without regard to the period of saturation required to create chroma 2 or less colors in the soil.

Synopsis of Opinion

For the reasons set forth in the Findings of Fact and Conclusions of Law, this administrative law judge finds Petitioners' claims supported by expert testimony and existing law and therefore persuasive, and believes that Respondent, in good faith, failed to follow its own rule on determination of soil wetness conditions and engaged in rulemaking without going through the procedures required by the Administrative Procedures Act, G.S. 150B.

**STATUTES AND RULES**

N.C. Gen. Stat. §130A-333, et. seq.; N.C. Gen. Stat. §150B, et.seq.  
15A N.C.A.C. 18A .1900 et. seq.

**EXHIBITS**

The following exhibits offered by Petitioners were admitted into evidence:

- 1-Letter dated February 12, 2001, from David Lindbo to  
John Williams, Land Management Group
- 4-Soil Survey, Union County, U. S. Department of Agriculture

The following exhibits offered by Respondent were admitted into evidence:

17U-Conference Announcement, "Ninth National Symposium on Individual and Small Community Sewage Systems," sponsored by the Society for Engineering in Agricultural, Food, and Biological Systems, March 11-14, 2001, The Radisson Plaza, Fort Worth, Texas

18-Draft paper to be presented at Texas conference, entitled, "A Suggested Water Table Monitoring Method Based on Soil Color Patterns," by David Lindbo, John Williams, Michael Vepraskas

**CONTESTED CASE DECISIONS**

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19 Memo from John Williams to Bob Odette dated 10/16/98, regarding the statutory requirement for soil science documents to be signed by a soil scientist and impressed with a seal

20 Photos, Hunter's Ridge, phase 3 subd.

21 Photos, Hunter's Ridge, phase 3 subd.

22 Photos, Hunter's Ridge, phase 3 subd.

23 Photos, Hunter's Ridge, phase 3 subd.

24 Tim Crissman, Brunswick County, notes regarding telephone conversation with John Williams, 6/29/00

25 Carteret County well monitoring program summary

26 no document

27 Letter dated October 7, 2000, by Michael Vepraskas to John Williams, regarding lot 86, Hunter's Ridge Subdivision

28 Paper by Robert Uebler, Regional Soil Scientist, N. C. Department of Environment and Natural Resources, proceedings of the On-Site Wastewater Conference, American Society of Agricultural Engineers, 1984, entitled, "Septic System Failure Rate on a Leon (Hardpan) Soil and Feasibility of Drainage to Improve System Performance".

30 Draft 6 "Protocol for Monitoring Soil Wetness," N. C. Department of Environment and Natural Resources

31 Chart of 16 contested cases at issue

32 Soil profile descriptions by David McCloy, Regional Soil Scientist, N.C. Department of Environment and Natural Resources of soil on sites considered in cases 00 EHR 1249, 00 EHR 1250, 00 EHR 1251, 00 EHR 1252, 00 EHR 1253, 00 EHR 1254, 00 EHR 1255, 00 EHR 1876, 00 EHR 1877, 00 EHR 1881, 00 EHR 1878, 00 EHR 1879, 00 EHR 1880, 00 EHR 1214, 00 EHR 1245

33 Final paper, On-site Wastewater Treatment, proceedings of the Ninth National Symposium on Individual and Small Community Sewage Systems, sponsored by the American Society of Agricultural Engineers, March 11-14, 2001, Fort Worth, Texas, "A Suggested Water Table Monitoring Method Based on Soil Color Patterns," by John Williams, David Lindbo, Michael Vepraskas,

34 10/18/99 memo from John Williams, then NCDENR employee, regarding proposed amendments to rule

35 Graduate student thesis, Xiaoxia He, "Estimating Historic Water Table Fluctuations in Coastal Plain Soils Using a Hydrologic Model and Hydric Soil Indicators. (Under the direction of Michael Vepraskas).

**STIPULATIONS**

Soil Science Experts

Tim Crissman, NCDENR  
David McCloy, NCDENR  
Bob Uebler, NCDENR  
Steve Steinbeck, NCDENR  
Steve Berkowitz, NCDENR  
Barbara Grimes, NCDENR  
John Williams, Land Management Group  
Michael Vepraskas, N.C. State University  
David Lindbo, N. C. State University

Respondent's Exhibits 1-16M

Respondent's Exhibit 36-Affidavit of Steven Berkowitz, Principal Engineer, N.C. Department of Environment and Natural Resources, On-site Wastewater Program

Respondent's Exhibit 37-Affidavit of David McCloy, Regional Soil Scientist, N.C. Department of Environment and Natural Resources

Resources

Respondent's 38-Affidavit of Steven Steinbeck, Head, Enforcement, N. C. Department of Environment and Natural Resources, On-site

Wastewater Program

Stipulation to Certain Facts—"Stipulation to the accuracy of the documents contained in Respondent's Exhibits 1-17m in reflecting the parties' respective interpretations of the direct observations of soil wetness in the lots for which applications for improvement permits were submitted in the above-captioned contested cases"

**FINDINGS OF FACT**

From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as fact as follows:

**Parties:**

1. Petitioner David T. Stephenson is an individual who resides in Lumberton, North Carolina.
2. Petitioner Acreage Brokers is a business corporation, a real estate brokerage located in Wilmington, N. C.; Petitioner Doug Golightly, is its principal officer; Petitioner James T. (Tom) Gulley, Jr., is an employee of Land Management Group, a business corporation located in Wilmington, N. C.
3. Petitioner Albert Galluzzo is an individual who resides in Hampstead; Petitioner James T. (Tom) Gulley, Jr. is an employee of Land Management Group.
4. Respondent, the North Carolina Department of Environment and Natural Resources (NCDENR), is an agency of the State of North Carolina organized and existing pursuant to Chapter 143B of the General Statutes of North Carolina.
5. The parties received notices of hearing by certified mail more than 15 days prior to the hearing.

**NCDENR's Authority to Regulate Wastewater System Permits:**

6. NCDENR has the authority and responsibility under N.C. Gen. Stat. §130A et. seq. to enforce the applicable laws and rules promulgated by the N. C. Commission for Health Services, which regulate the installation of on-site sewage treatment and disposal systems.
7. N. C. Gen. Stat. §130A-335(b) provides that all ground absorption wastewater systems shall be regulated by NCDENR under rules adopted by the Commission for Health Services.
8. The Commission for Health Services has promulgated rules codified at N.C. Admin. Code Title 15A, Chapter 18A, regulating on-site sewage treatment and disposal systems. The Commission for Health Services has adopted the rules for sewage treatment and disposal systems codified at 15A N.C.A.C. 18A .1900 et. seq.
9. Environmental Health Specialists employed by the Brunswick County Health Department act as agents of Respondent N. C. Department of Environment and Natural Resources when applying statutes and rules concerning the regulation of on-site sewage treatment and disposal in North Carolina.
10. Application and interpretation of Rule .1942 is at the heart of the controversy in these contested cases. The rule provides:

**15A NCAC 18A .1942 SOIL WETNESS CONDITIONS**

(a) Soil wetness conditions caused by a seasonal high-water table, perched water table, tidal water, seasonally saturated soils or by lateral water movement shall be determined by observation of colors of chroma 2 or less (Munsell color chart) in mottles or a solid mass. If drainage modifications have been made, the Department may make a determination of the soil wetness conditions by direct observation of the water surface during periods of typically high water elevations. However, colors of chroma 2 or less which are relic from minerals of the parent material shall not be considered indicative of a soil wetness condition. Sites where soil wetness conditions are greater than 48 inches below the naturally occurring soil surface shall be considered SUITABLE with respect to soil wetness. Sites where soil wetness conditions are between 36 inches and 48 inches below the naturally occurring soil surface shall be considered

PROVISIONALLY SUITABLE with respect to soil wetness. Sites where soil wetness conditions are less than 36 inches below the naturally occurring soil surface shall be considered UNSUITABLE with respect to soil wetness.

(b) Where the site is UNSUITABLE with respect to soil wetness conditions, it may be reclassified PROVISIONALLY SUITABLE after an investigation indicates that a modified or alternative system can be installed in accordance with Rule .1956 or Rule .1957 of this Section.

*History Note:* Authority G.S. 130A-335(e);  
Eff. July 1, 1982;  
Amended Eff. January 1, 1990.

11. Rule .1961 provides, in pertinent part:

**15A NCAC 18A .1961 MAINTENANCE OF SEWAGE SYSTEMS**

(a) Any person owning or controlling the property upon which a ground absorption sewage treatment and disposal system is installed shall be responsible for the following items regarding the maintenance of the system:

- (1) Ground absorption sewage treatment and disposal systems shall be operated and maintained to prevent the following conditions:
  - (A) a discharge of sewage or effluent to the surface of the ground, the surface waters, or directly into groundwater at any time; or
  - (B) a back-up of sewage or effluent into the facility, building drains, collection system, or freeboard volume of the tanks; or
  - (C) a free liquid surface within three inches of finished grade over the nitrification trench for two or more observations made not less than 24 hours apart. Observations shall be made greater than 24 hours after a rainfall event.

The system shall be considered to be malfunctioning when it fails to meet one or more of these requirements, either continuously or intermittently, or if it is necessary to remove the contents of the tank(s) at a frequency greater than once per month in order to satisfy the conditions of Parts (A), (B), or (C) of this Paragraph. Legal remedies may be pursued after an authorized agent has observed and documented one or more of the malfunctioning conditions and has issued a notice of violation. . . .

12. Rule .1939 provides, in pertinent part:

**15A NCAC 18A .1939 SITE EVALUATION**

(a) The local health department shall investigate each proposed site. The investigation shall include the evaluation of the following factors:

- (1) topography and landscape position;
- (2) soil characteristics (morphology);
- (3) soil wetness;
- (4) soil depth;
- (5) restrictive horizons; and
- (6) available space.

(b) Soil profiles shall be evaluated at the site by borings or other means of excavation to at least 48 inches or to an UNSUITABLE characteristic and a determination shall be made as to the suitability of the soil to treat and absorb septic tank effluent. Applicants may be required to dig pits when necessary for proper evaluation of the soil at the site.

(c) Site evaluations shall be made in accordance with Rules .1940 through .1948 of this Section. Based on this evaluation, each of the factors listed in Paragraph (a) of this Rule shall be classified as SUITABLE (S), PROVISIONALLY SUITABLE (PS), or UNSUITABLE (U).

(d) The local health department shall determine the long-term acceptance rate to be used for sites classified SUITABLE OR PROVISIONALLY SUITABLE in accordance with these rules.

*History Note:* Authority G.S. 130A-335(e);  
Eff. July 1, 1982;  
Amended Eff. January 1, 1990.

13. Rule .1964 provides, in pertinent part:

**15A NCAC 18A .1964 INTERPRETATION AND TECHNICAL ASSISTANCE**

(a) The provisions of this Section shall be interpreted, as applicable, in accordance with the recognized principles and practices of soil science, geology, engineering, and public health.

(b) The State will provide technical assistance. Local health departments may obtain technical information and assistance from appropriate personnel as may be needed for interpretation of this Section.

*History Note: Authority G.S. 130A-335(e);  
Eff. July 1, 1982;  
Amended Eff. January 1, 1990.*

**Expert Testimony Regarding Interpretation of Well Monitoring Hydrographs**

14. Testimony by David McCloy

A. David McCloy, Regional Soil Scientist, NCDENR, testified that the most accurate method of interpreting hydrographs with the purpose of protecting the public health is to read the level 48 hours after the end of a measured rainfall event to determine the soil wetness condition in drained sites pursuant to rule 15A N.C.A.C. 18A .1942. (T p. 225, lines 8-11)

B. Dr. McCloy stated that the purpose of making interpretations of soil wetness conditions under Rule .1942 is consistent with the mission statement of the Division of Environmental Health of NCDENR, as follows:

To safeguard life, promote human health, and protect the environment through the practice of modern environmental health science, the use of technology, rules, public education and, above all, dedication to the public trust.

(T p. 221, lines 20-25).

C. He based the 48 hour measure on the concept of “field capacity,” and stated, “At the end or 48 hours, the gravitational water would have been removed from the soil profile and what would be left would be the water held in fill (sic) [field] capacity.” (T p. 225, lines 17-21) He explained “gravitational water,” as follows: “Gravitational water would be water running through the profile, say after a precipitation event and you would have that in any soil, well drained or poorly drained soil.” (T p. 225, lines 23-25, p. 226, lines 1-2)

D. In reviewing the hydrograph for lot 86, Hunter’s Ridge, David McCloy determined the soil wetness condition to be at 27 inches below the natural soil surface, based on the reading 48 hours after a significant rainfall event. (T p. 213, lines 17-20, p. 237, lines 8-10). He stated that, in light of the perched water condition on the lot, an interceptor drain placed on the property would additionally lower the water table, making a shallow conventional system possible. (T p. 214, lines 1-4, lines 12-17). Without further drainage, the other option is a low pressure pipe system. (T p. 214, lines 9-11)

E. David McCloy did soil borings on lot 86, and concluded that:

...[t]here was a spodic like horizon, a dark horizon, a BH horizon between 11 and 27 inches which would be restrictive to water in the soil profile. It could create a perched water condition by which you’d have a soil wetness condition.

And, I also saw evidence of less than chroma 2 colors within the soil surface.

(T p. 212, lines 16-22).

He further stated that the horizon would be massive and perhaps, in certain places, may be brittle and that water could be moving laterally through the soil profile on top of that particular horizon. (T p. 253, lines 20-24).

F. David McCloy’s expert opinion regarding the 21 days of continuous saturation theory proposed by Petitioners for interpretation of hydrographs was that:

From what I understand the 28 or 21 day proposal is reflective of when you’re going from a well drained soil and you saturate that soil, that soil now becomes wet-how long would it take for that soil which previously had exhibited colors above chroma-2 now to exhibit 10 to 20 percent abundance of chroma-2 or less colors.

Regarding formation of mottles of chroma 2 or less, Dr. McCloy stated as follows:

They are formed by reduction of iron compounds in the soil under reducing conditions, low BH (sic) [PH] conditions, by which the crystalline oxidized iron compounds become reduced, become soluble and the iron, for the most part, can be washed away leaving the remaining color of the soil minerals which, for the

most part, would be gray. wet-how long would it take for that soil which previously had exhibited colors above chroma-2 now to exhibit 10 to 20 per cent abundance of chroma-2 or less colors.

This, in my opinion, does not necessarily reflect the goal of the monitoring policy which has a particular degree of saturation that would reflect at what point you would pass that there would be danger of an infectious dose of microorganisms -pathogenic microorganisms.  
(T pp. 228-229)

\* \* \* \*

Three weeks is a significantly long time for the transfer of microorganisms into the soil. In three weeks time, the pathogenic microorganisms could definitely pollute wells.

The sewage effluent with the organisms within the sewage effluent could come to the surface and you'd probably have a failed system.

(T p. 229, lines 4-11, p. 240, lines 7-18)

G. Dr. McCloy had reservations about certain hydrographs submitted by Land Management Group, but took them on face value. (T p. 257, lines 12-15)

H. Dr. McCloy testified that the On-site Wastewater staff, in considering a draft protocol that would have used a 14 day standard for saturation, "saw the limitations and the pitfalls of the draft and decided that this was inappropriate, that it would not sufficiently protect the public health." (T p. 261, lines 1-10) Then, the members discussed the need for more research as to the length of saturation before there would be a problem of infectious doses of microorganisms. By the end of the conference, the participants had decided that the seasonal variations of the observed water surface would be evaluated 48 hours after the rainfall event as a reasonable standard that would protect the public health and reduce the impact on the groundwater. (T. p. 261, lines 15-21)

(T p. 266, lines 9-15)

15. Affidavit of Steve Steinbeck, NCDENR

A. In his affidavit, Steve Steinbeck, P. G., Head of Enforcement for On-site Wastewater, NCDENR, points out that there are two methods for finding levels of soil wetness: for undrained sites, observations of chroma II or less; for drained sites, direct observation of the highest water elevations. Respondent's Exhibit 38. Land Management Group's proposed theory, which would link a 21 day saturation period with findings of chroma 2 or less, is unworkable because one cannot rely on colors in a drained site to determine suitability for a wastewater permit. Respondent's Exhibit 38 at 2. According to Steve Steinbeck:

....It is not the appearance of chroma 2 or less soil wetness colors that is critical, but the presence of saturated soil conditions that can negatively impact the performance of the subsurface wastewater disposal system and groundwater. One of the issues recognized at the time of this rule preparation, and one that continues to this day, is the need to normalize the data from a select monitoring period or a relatively simple method to adjust the observations for abnormally dry periods....

Respondent's Exhibit 38 at 2.

B. Steve Steinbeck further stated as follows:

Further, the justification for the 21 days of high piezometer readings as the cutoff point is not supported by any known research as it relates to the impact on the health of the wastewater system and the public's health. What the application of this thesis would create is an annual situation whereby the user of the system would be unable to flush their toilets without "overflowing the already full bucket of water" for periods of almost a month or possibly more. As the authors (Williams, Lindbo, and Vepraskas) stated in their paper recently presented at a conference in Fort Worth, Texas, was to "introduce a suggested method" that is "based on some preliminary soil morphology-water table data that need to be expanded and refined." These authors conclude by stating "More work will be done to fine tune the suggested method so that the regulatory community can adopt it as rule or policy." I could not agree more.

Respondent's Exhibit 38 at 2.

16. Testimony by Bob Uebler

A. Bob Uebler, Regional Soil Scientist, NCDENR, testified that he examined the hydrograph for lot 86, and determined that the soil wetness condition was at 24", based on direct observation and a reading of the highest peak of the hydrograph. (T p. 19) Later, he re-considered his opinion to coincide with many years of practice by NCDENR, and agreed with David McCloy's determination of the soil wetness condition at 27". (T p. 16, lines 18-25). In his expert opinion, measuring soil wetness condition 48 hours after the last measured rainfall event is a recognized practice within soil science in terms of the field capacity concept. (T p. 169)

B. Bob Uebler's role in relation to the Brunswick County review of hydrographs for the Stephenson cases was to assist Tim Crissman. (T p. 171, lines 6-8). Bob Uebler insisted that his name be removed from a paper by John Williams, Michael Vepraskas, and David Lindbo to be submitted at a March conference which supported the theory of 21 days saturation as equivalent to formation of chroma 2 or less for purposes of siting on-site wastewater systems. (T p. 171-172) It is his belief that the methodology was not yet well enough established. (T p. 172) This is the same method for interpretation of hydrographs that Petitioners are recommending, which Dr. Uebler believes has not had enough data sets to confirm it. (T pp. 174-175).

**He stated as follows:**

We do not know how that 21 day continuous degree of saturation will affect the performance of the septic tank system...Soils that are saturated for even short periods of time frequently suffer problem ...with the septic tank systems.

(T p. 204, lines 11-22)

Dr. Uebler said that there can be problems when sites are saturated for less time than it takes to change soil color.

C. Dr. Uebler disagreed with Michael Vepraskas' conclusion, as stated in Michael Vepraskas' letter dated October 7, 2000, to John Williams, that the soil wetness condition for lot 86 is at 36". (Respondent's Exhibit 27, T p. 176). Michael Vepraskas did only one boring for his soil profile, and concluded, using the 21 day equivalent theory, and discounting the upper BH, that the soil wetness condition was at 31-36 inches. (T p. 177, p. 184, p. 382, lines 21-24) Whereas, Land Management Group determined that the soil wetness condition was at 40 inches. (Respondent's Exhibit II).

D. In a study by Dr. Uebler entitled, "Septic System Failure Rate on Leon Hard Pan Soil and Feasibility of Drainage to Improve System Performance," which was presented at the On-site Wastewater Conference of the American Society of Agricultural Engineers in 1984, the study surveyed a total of 593 systems in Brunswick County. The results of the survey showed that the 151 systems that were installed in Leon soils had three times the failure rate compared to all of the other systems installed in other soils in the county. This was due to the fact that these soils are wet and some of them have restrictions in them to the flow of sewage, which led to difficulties with the performance of the septic tank systems in the form of surfacing of sewage on the ground. (T p. 181-182). In Dr. Uebler's opinion, the Leon soils are substantially similar to the soils at issue in this case. (T p. 183, p. 191, lines 16-22, p. 209, lines 14-25) Also, Dr. Uebler visited lot 86 and performed several borings on the lot. (T p. 192). On a diagram, Land Management Group designated lot 37, Red Oak Subdivision, 00 EHR 1214, as Leon soils. Respondent's Exhibit 15L at 6.

**17. Testimony by John Williams, Land Management Group**

A. John Williams testified that he is co-author of a draft paper entitled "A Suggested Water Table Monitoring Method Based on Soil Color Patterns," that was to be submitted to a conference called the 9<sup>th</sup> National Symposium on Individual and Small Community Sewage Systems, in Fort Worth, Texas, in March 11-14, 2001, in which the following statement is made regarding the Land Management Group's theory of 21 day saturation period as equivalent to formation of chroma 2 or less,

Although these findings are important it must be noted that they are still preliminary and need to be refined with data from additional sites.

(T p. 74, lines 9-12, Respondent's Exhibit 17-U and 18)

B. Further, John Williams admitted that, when he was regional soil scientist, by e-mail he advised Brunswick County that all soil science documents shall be signed by the soil scientist and impressed with the seal. (T p. 83, lines 9-18, Respondent's Exhibit 19) He further admits that the hydrographs regarding all of the Stephenson lots in Hunter's Ridge, which he was involved in, were not signed and sealed. (T p. 85, lines 16-19).

**18. Testimony by Michael Vepraskas, N.C. State**

Dr. Michael Vepraskas testified that he is an expert in the area of "soil morphology and water table measurements." (T p.

378, lines 12-13) He testified that he was paid for his testimony at the hearing. (T p. 406, lines 14-16) His research focuses on water table levels and soil color patterns. (T p. 379, lines 1-2)

In particular, his research on 21 days of saturation of the soil has not focused on soil wetness condition with regard to septic tank system performance, but rather on finding the closest correlation to chroma 2 colors. (T p. 387, lines 21-25, p. 388, lines 9-12).

Dr. Vepraskas referred, without naming it explicitly, to the He study (discussed in Lindbo testimony below) as support for the theory that it takes 21 days for saturated soil to become anaerobic, "on average". (T p.386, lines 21 -24) (Emphasis added).

He testified that there is a justification for having two methods for evaluating soil wetness under Rule .1942--one for drained sites and one for undrained sites. (T p. 402, lines 5-8).

Dr. Vepraskas first testified that the measurement of soil wetness condition by direct observation 48 hours after the end of a rainfall event is known as fill (sic) [field capacity], a "rule of thumb" for soil as follows:

I don't understand why you'd pick a 48 hour value. It's at best a rule of thumb that Extension people may give to a farmer saying, "don't get on your soil until two days after a heavy rain because if you're too wet, you'll cause compaction." It's basically a rule of thumb.

(T p. 405, lines 15-20) (Emphasis added).

Then, he contradicts the statement that it is a "rule of thumb" by stating as follows:

Now, waiting 48 hours for drainage to occur, is, in my opinion, arbitrary and not justified for all soils.

(T p. 405, lines 21-23)

Dr. Vepraskas testified that he did only one boring on lot 86. (T p. 406, lines 17-18)

He further testified that he is not an expert in evaluating soils for purposes of siting septic tank systems. (T p. 409, lines 10-13) He stated that he did not know the duration of saturation that it would take to influence the performance of a septic tank system. (T p. 410, lines 2-9).

19. Testimony by Dr. David Lindbo and Response by Steven Berkowitz. NCDENR

A. Dr. David Lindbo, N. C. State University, testified that the type of site where one would use a well monitor is where the hydrology has been altered, or there's good evidence that the hydrology has possibly been altered, e.g. by stream downcutting, shifting of river channels, pumping, drainage ditches. Therefore, the soil colors would not be in equilibrium with the current hydrology of the site. (T. p. 439) In response to questions on direct, Dr. Lindbo stated that he believes that one can correlate well data to the chroma 2 color to arrive at a standard. (T p. 441).

In his role as advisor to NCDENR, Respondent, Dr. Lindbo told them to "pick a method so that we have something to discuss". (T p. 449, lines 24-25).

B. Dr. Lindbo knew of no research that had been done with regard to the impact of 21 days of soil saturation on the operation of wastewater systems and on the groundwater. (T p. 451, lines 15-19). He also did not know of any research that had been done with drained sites to show a 21 day equivalent to formation of chroma 2. (T p. 451, lines 20-25, p. 452, lines 9-10). Moreover, in the final draft of his paper which was co-authored with John Williams and Michael Vepraskas and submitted at the conference on On-site Wastewater Treatment which was held in Texas in March, 2001, Dr. Lindbo stated:

Although these findings are important, it must be noted that they are still preliminary and need to be refined with data from additional sites.

(T p. 454, Respondent's Exhibit 33 at 3)

C. On cross-examination, Dr. Lindbo stated that this paragraph referred to the theory of 21 days of saturation as equivalent with formation of chroma 2 mottles. (T p. 454). Dr. Lindbo stated that the paper was written in August, 2000, but that additional research had been done in the He thesis (Respondent's Exhibit 35), "And, I think we're much closer, if not at the point, where 21 days is--we've looked at other sites and is a better correlation." (T p. 455, lines 13-15). However, Dr. Lindbo acknowledged that only one of the sites studied in the He thesis would have qualified for a conventional wastewater system permit, based on soil wetness; and one would have qualified for a permit for a fill system. (T pp. 467-468).

D. In his affidavit, Steven Berkowitz, P. E., Principal Engineer, On-site Wastewater, NCDENR, states that the method

proposed in the He thesis does not appear to support the theory propounded by Petitioners in Dr. Lindbo's letter dated February 12, 2001, because

...the proposed method does not provide a means to adjust the estimate made from measurements taken during a given season to account for whether the monitored year was sufficiently wet.

(Respondent's Exhibit 36 at 2)

E. Finally, in the expert opinion of Steven Berkowitz, the use of the He thesis in support of Petitioner's theory is flawed because:

...In other words, applying Petitioner's proposed method as supported in David Lindbo's letter by reference to the He thesis, during any given year would most likely result in an estimated depth to soil wetness 12 or more inches deeper in the soil profile (at 30 or more inches) than indicated by the appearance of gray mottles of chroma 2 or less.

(Respondent's Exhibit 36 at 2)

F. Steve Berkowitz also raises a fundamental question about whether the He thesis would have any application to the consolidated cases at issue, since the thesis relates to undrained sites, as follows:

Furthermore, the He thesis reports on the relationship of water levels compared to soil wetness indicators on essentially undrained sites only.

It is my understanding that the majority of sites which are the subject of this hearing in Brunswick County are drained. It is unclear how the findings from the undrained research sites can be related to the expected performance of septic systems in these partially drained sites in Brunswick County.

(Respondent's Exhibit 36 at 2)

G. In discussing a proposed rule change that would have incorporated the 21 day theory which was drafted by John Williams while a NCDENR employee, and circulated to a large group of peers, Dr. Lindbo stated that he had agreed to it, wasn't sure that everybody else did, and that it had not been adopted by the state. (T p. 458, lines 21-25)

H. Dr. Lindbo further stated that the 21 day method proposed for interpreting monitoring well data has not been accepted as the standard by the profession of soil science (T p. 468, lines 4-9).

Documents regarding Applications for Improvement Permits for Stephenson's 14 Lots on Hunter's Ridge Subdivision; Acreage Brokers' Lot 37, Red Oak Estates Subdivision; and Albert Galluzzo's Lot 30, Sandy Creek Acres

20. Petitioners applied to the Brunswick County Health Department for improvement permits, as follows:

A. Stephenson v. NCDENR, Lot 86, Hunter's Ridge, 00 EHR 0769

1. Petitioner submitted an application for an improvement permit and construction authorization permit dated May 28, 1999, for a three-bedroom manufactured house located on lot 86, a drained site, in Hunter's Ridge Subdivision, Town Creek, North Carolina. Respondent's Exhibit 1A. Brunswick County made a soil profile analysis. Respondent's Exhibit 1F. By letter dated October 6, 1999, Brunswick County Health Department denied the application based on the following reasons: unsuitable soil characteristics, 15A N.C.A.C. 18A .1941; soil wetness condition less than 12" below naturally occurring soil surface, 15A N.C.A.C. 18A .1942, .1957(b); presence of restrictive horizon greater than 3" thick within 18" of original soil surface, 15A N.C.A.C. .1944, .1957(b); insufficient space for septic system and repair area 15A N.C.A.C. 18A .1945. Brunswick County suggested monitoring wells on-site. Brunswick County informed Petitioner of the option to submit a site-specific design and a system design to the health department for technical review pursuant to Rule .1948(d), and his right to appeal the denial of the permit pursuant to N.C. Gen. Stat. 130A-24. Respondent's Exhibit 1E.

2. Petitioner submitted a site monitoring well application on December 30, 1999, Respondent's Exhibit 1H. Brunswick County set up monitoring wells and recorded the well readings. Respondent's Exhibit 1G. Land Management Group installed monitoring wells on lot 86, and on May 6, 2000, submitted hydrographs without supporting data, and a cover letter stating that the soil wetness condition was at 40". This letter lacked the signature or seal of a licensed soil scientist. Respondent's Exhibit 1I. In coming to this conclusion, Land Management Group used a recently developed method, not accepted in practice by all soil scientists, stated as follows:

Land Management Group, Inc., has completed the soil wetness condition and rainfall analysis for the year 2000 season. Land Management Group, Inc., has adopted the proposed methodology set forth by the State Division of

Environmental Health in 1999. That methodology calls for daily readings of the free water surface in the wells and an assessment of the shallowest depth at which 21 days of saturation (cumulatively or consecutively) occurs. The 21 day standard must be applied during periods of "normal" rainfall. The proposed methodology has set a minimum standard of the 30<sup>th</sup> percentile of the 30+ year average for any given recording station as the base limit for "normality."

Respondent's Exhibit II at 2.

Land Management made the same statement in its letter to Respondents in all of the contested cases at issue. See Respondents' Exhibits 1A-16M.

3. By letter dated May 24, 2000, Brunswick County notified Petitioner that, based on the monitoring well data submitted by Land Management Group, the soil wetness condition on lot 86 was 24 inches below the existing ground surface; stated that a low pressure pipe wastewater system permit could be issued once plans were received; notified Petitioner of his right to request informal review by NCDENR; and notified Petitioner of his right to appeal the health department's decision. (Respondent's Exhibit 1K). No such plans ever were received. Petitioner filed its petition on June 5, 2000. By letter dated August 1, 2000, the N.C. Department of Environment and Natural Resources stated that it had reviewed the determination of the Brunswick County Health Department, and determined that the soil wetness condition was at 27 inches below the existing ground surface. (Respondent's Exhibit 1N at 2). On direct examination, Tim Crissman, Brunswick County, stated that he had determined the soil wetness condition by examining the highest peak of the hydrograph. (T p.157). On direct examination, David McCloy, stated that he had followed standard operating procedure by using the long-established "field capacity" method, had taken the reading on the hydrograph forty-eight hours from the end of the last rainfall event, and had determined the soil wetness condition to be at 27". (Respondent's Exhibit 1N at 2, T p. 225) In his letter, David McCloy stated that, without further soil drainage, a low pressure pipe wastewater system could be installed on lot 86. He stated that, with further drainage, an interceptor drain, a shallow conventional wastewater system could be installed. (Respondent's Exhibit 1N at 3). Petitioner declined to accept either of these options.

B. Stephenson v. NCDENR, Lot 62, Hunter's Ridge, 00 EHR 1249

1. The Roebuck Company, by Barry Mills, submitted an application for improvement permit dated May 7, 1997, for lot 62, Hunter's Ridge Subdivision, a drained site, for a three-bedroom mobile home. (Respondent's Exhibit 2A1). A soil profile evaluation was conducted on May 8, 1997, Respondent's Exhibit 2B, and the County sent the Petitioner a letter dated June 9, 1997, in which the County denied the Petitioner's application based on unsuitable soil characteristics, soil wetness condition less than 12" below naturally occurring soil surface, and presence of restrictive horizon. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. Respondent's Exhibit 2C.

2. On January 3, 2000, Tom Stephenson by signature of John Williams submitted a site monitoring well application. Respondent's Exhibit 2F. On January 4, 2000, Brunswick County conducted a soil evaluation of the lot, and found it to be unsuitable for siting of a wastewater system. (Respondent's Exhibit 2G at p. 2). Brunswick County also conducted its own well monitoring, on a spotcheck basis, and found the soil wetness levels to be as high as 4.5 inches, 10.5 inches, and 17 inches on three separate days. Other recorded levels likewise were at levels unsuitable for a conventional wastewater system. (Respondent's Exhibit 2F).

3. By letter dated May 2, 2000, Land Management Group, under the signature of a environmental scientist, in an unsealed document which included hydrographs but no supporting data, asserted that the soil wetness condition was determined to be 26" in one well, and 24" in another well. Land Management Group used the same preliminary theory in this case that was used in the determination of soil wetness in analyzing lot 86 and all other lots at issue in this consolidated case: 21 days of continuous/consecutive saturation as the equivalent to chroma II or less.

4. By letter dated July 24, 2000, Brunswick County in conjunction with N.C. Department of Environment and Natural Resources stated that the hydrographs that were submitted did not support the issuance of an improvement permit, and advised Petitioner of his right to appeal. (Respondent's Exhibit 2K). On August 25, 2000, Petitioner filed his petition.

5. By letter dated January 9, 2001, the N.C. Department of Environment and Natural Resources informed Petitioner that interpreting the hydrograph at forty-eight hours after the end of any measured precipitation event shall be the depth to soil wetness condition. (Respondent's Exhibit 2M at 2). Using this measure, NCDENR determined the soil wetness to be at 2 inches below the soil surface. (Respondent's Exhibit 2M at 2). Pumping the effluent off-site from any wastewater system installed would be required. (Respondent's Exhibit 2M at 2-3).

C. Stephenson v. NCDENR, Lot 65, Hunter's Ridge Subdivision, 00 EHR 1250

1. The Roebuck Company, c/o Tom Stephenson submitted an application for improvement permit and construction authorization permit dated December 21, 1999, for lot 65, a drained site, for a wastewater system to serve a three bedroom

manufactured home. (Respondent's Exhibit 3A). The recorded map of Hunter's Ridge, Section Three Subdivision, which shows that Roebuck Company is deedholder, also shows the locations of all the Hunter's Ridge lots at issue in this case. (Respondent's Exhibit 3E). On December 29, 1999, Brunswick County performed a soil/site evaluation of lot 65, and concluded that the lot was unsuitable for siting of a conventional wastewater system due to soil wetness condition at less than 12" from the existing soil surface, and insufficient space for repair system. (Respondent's Exhibit 3F at p. 2). Petitioner Tom Stephenson by signature of John Williams submitted a site monitoring well application dated December 30, 1999. (Respondent's Exhibit 3 G). By letter dated January 11, 2000, Brunswick County informed Petitioner that the soil on lot 65 was unsuitable due to soil wetness condition, and insufficient space for septic system and repair area. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 3H).

2. By letter dated May 2, 2000, and hydrographs not signed or sealed by a licensed soil scientist from Land Management Group, Petitioner stated that the soil wetness condition was at 32" at one well; and 30" at another well. Petitioner used the 21 day saturation theory as equivalent to chroma II or less colors for its evaluation of the Lot 65 hydrographs. (Respondent's Exhibit 3J).

3. NCDENR and Brunswick County conducted a joint review of Respondent's hydrographs and stated in a letter to Petitioner dated July 24, 2000, that the hydrographs do not support the issuance of an improvement permit, and that he could appeal this decision within 30 days. (Respondent's Exhibit 2K). Petitioner filed his petition on August 25, 2000.

4. By letter dated January 12, 2001, David McCloy informed Brunswick County, which by standard operating procedure then informed Petitioner, that the hydrographs reflected that the soil wetness condition was at 7" below the soil surface; and that by observation of the soil, the soil wetness condition was found to be less than 11" below the soil surface. He concluded that pumping off-site would be the only proper wastewater treatment solution. (Respondent's Exhibit 3 M).

D. Stephenson v. NCDENR, lot 64, Hunter's Ridge Subdivision                      00 EHR 1251

1. By application for improvement permit and construction authorization permit dated December 21, 1999, Tom Stephenson requested a permit for a three-bedroom manufactured home for Hunter's Ridge Subdivision, lot 64, a drained site. (Respondent's Exhibit 4A). A soil evaluation was conducted by Brunswick County on December 29, 1999, and the lot was found to be unsuitable due to soil wetness condition of less than 12", lack of space for a repair area, and spodic/restrictive horizon not continuous across lot. (Respondent's Exhibit 4D). Petitioner, by John Williams, Land Management Group, submitted a site monitoring well application dated December 30, 1999. (Respondent's Exhibit 4E). By letter dated January 11, 2000, Brunswick County informed Petitioner that the application for permit was denied due to unsuitable soil wetness condition, and insufficient space for septic system and repair area. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 4F). Land Management Group did daily well monitoring on the property and submitted a cover letter dated May 2, 2000, which was not signed or sealed by a licensed soil scientist, in which it concluded that the depth of soil wetness was 34" in one well and 31" in another well. Hydrographs were attached as well as the standard statement of the method used, which was 21 days of saturation as equivalent to chroma II or less colors. (Respondent's Exhibit 4H). Brunswick County's spotcheck well monitoring results indicated soil wetness of 4", 2.75", 16.5", 18.5", among others. (Respondent's Exhibit 4G).

2. By letter dated July 24, 2000, Brunswick County, with the assistance of NCDENR, concluded that the hydrographs did not support issuance of an improvement permit, and informed Petitioner of his right to appeal this decision within 30 days. (Respondent's Exhibit 4J). Petitioner filed his petition on August 25, 2000.

3. By letter dated January 12, 2001, NCDENR stated that, according to soil morphology, the soil wetness condition was at 9 inches or less; and that, according to the monitoring well data, the soil wetness condition was at 14" below the soil surface. (Respondent's Exhibit 4K). The options presented to Petitioner were stated in Respondent's Exhibit 37, Affidavit of David McCloy as a revision to the letter dated January 12, 2001, as follows:

Pretreatment (Type B) to provide a minimum of 9 inches in vertical separation of bottom of trench to soil wetness and (a) pump to a low pressure pipe drainfield or (b) pump to a conventional drainfield in a fill system.

(Respondent's Exhibit 37).

E. Stephenson v. NCDENR, lot 69, ½ 68, Hunter's Ridge Subdivision, 00 EHR 1252

1. Petitioner filed an application for an improvement permit and construction authorization permit dated May 28, 1999, for a wastewater system to serve a three-bedroom manufactured house. (Respondent's Exhibit 5A). On June 16, 1999, Brunswick County performed a soil evaluation at lot 69 and found the soil to be unsuitable for a wastewater system due to soil wetness condition, .1942, restrictive horizon, .1944, insufficient space, .1945. (Respondent's Exhibit 5D). Brunswick County sent a letter to Petitioner dated

June 16, 1999, which informed him that the application for improvement permit was denied. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 5E). Petitioner filed a site well monitoring application dated December 30, 1999. (Respondent's Exhibit 5F). By letter dated May 2, 2000, Land Management Group informed Petitioner that the soil wetness condition was at 28" for one well, and 32" for another well. Petitioner used the method that 21 days of saturation is equivalent to colors of chroma II or less in interpreting its hydrographs to make this determination. (Respondent's Exhibit 5H). Bob Uebler, Regional Soil Scientist, NCDENR, and Brunswick County made a joint evaluation of the hydrographs, and determined that the soil was unsuitable for a wastewater system. By letter dated July 24, 2000, Respondent informed Petitioner of its decision, and of the right to appeal this decision within 30 days. (Respondent's Exhibit 5J). Petitioner filed his petition on August 25, 2000.

2. By letter dated January 18, 2001, to Brunswick County, David McCloy, Regional Soil Scientist, NCDENR, stated that, based on his evaluation of the site, evidence of soil wetness condition was observed at less than 5 inches below the natural soil surface. Based on the well monitoring data, the soil wetness condition was determined to be less than 12 inches below the natural soil surface. He determined that "Overall, Lots #69 and ½ 68 are unsuitable due to soil wetness," and gave the option of pumping effluent off-site and obtaining an easement to other property. (Respondent's Exhibit 5K at pp. 2-3).

F. Stephenson v. NCDENR, lot 67 1/2 68, Hunter's Ridge Subdivision, 00 EHR 1253

1. By application for improvement permit and construction authorization permit dated May 28, 1999, Petitioner requested a wastewater permit for a three-bedroom manufactured home located at lot 68, Hunter's Ridge Subdivision, Town Creek, North Carolina. (Respondent's Exhibit 6A). Brunswick County completed a soil evaluation for lot 68 on June 16, 1999, in which it determined that the soil was unsuitable. (Respondent's Exhibit 6D). The County sent a letter dated June 16, 1999, in which it informed the Petitioner that the site was unsuitable due to soil wetness condition, presence of restrictive horizon, and insufficient space for septic system and repair area. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 6E). Petitioner by John Williams, Land Management Group, submitted a Site Monitoring Well Application dated December 30, 1999. (Respondent's Exhibit 6F). By letter dated May 2, 2000, Land Management Group submitted a document that stated that the soil wetness condition was at 24" in one well, and 32" in another well. In making this determination from its hydrographs, Land Management Group used the method that 21 days of continuous/consecutive saturation is equivalent to colors of chroma II or less. (Respondent's Exhibit 6I). By letter dated July 24, 2000, Bob Uebler, regional soil scientist, NCDENR, and Brunswick County informed Petitioner that their review of the well monitoring hydrographs led to the decision that the site is not suitable for an on-site wastewater system, and informed Petitioner of his right to appeal. (Respondent's Exhibit 6J). Petitioner filed his appeal on August 25, 2000.

2. By letter dated January 18, 2001, NCDENR informed Brunswick County that evidence of soil wetness condition (soil colors with chroma 2 or less) was observed less than 4" below the natural soil surface. From the monitoring well hydrographs, NCDENR determined the soil wetness condition to be 6" below the natural soil surface. NCDENR offered Petitioner the option of pumping the effluent off-site. (Respondent's Exhibit 6K).

G. Stephenson v. NCDENR, Lot 90, Hunter's Ridge Subdivision, 00 EHR 1254

1. Petitioner filed an application for improvement permit dated December 21, 1999, for a three-bedroom manufactured house for lot 90, Hunter's Ridge Subdivision, Leland, North Carolina. (Respondent's Exhibit 7A). Brunswick County Health Department performed a soil evaluation on the property on January 4, 2000, and determined that the site was unsuitable due to soil wetness condition, and lack of space for wastewater system and repair system. (Respondent's Exhibit 7F). By letter dated January 11, 2000, Brunswick County informed Petitioner of the denial of its application for improvement permit based on soil wetness condition, and insufficient space for septic system and repair area. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 7G). On December 30, 1999, John Williams on behalf of Land Management Group, submitted a site monitoring well application. (Respondent's Exhibit 7H). Brunswick County performed spotcheck well monitoring. (Respondent's Exhibit 7I). By letter dated May 2, 2000, which lacked the seal or signature of a licensed soil scientist, Land Management Group asserted that, based on its theory that 21 days of continuous/cumulative rainfall as equivalent to chroma II or less, the soil wetness condition was at 37". (Respondent's Exhibit 7I).

2. By letter dated July 24, 2000, Brunswick County informed Petitioner that the site was unsuitable, based on joint review by Brunswick County and NCDENR of the well monitoring hydrographs, and that Petitioner could file an appeal. (Respondent's Exhibit 7K). Petitioner filed his appeal on August 25, 2000. By letter dated January 22, 2001, David McCloy, Regional Soil Scientist, informed the Brunswick County Health Department that the soil wetness condition was 7 inches below the surface; and based on the monitoring well hydrographs, the soil wetness condition was at 13 inches below the natural soil surface. (Respondent's Exhibit 7L). David McCloy amended his letter by affidavit admitted into evidence at trial, and stated that the appropriate option available for lot 90

was "Pretreatment (Type B) to provide a minimum of 9 inches in vertical separation of bottom of trench to soil wetness and (a) pump to a low pressure pipe drainfield or (b) pump to a conventional drainfield in a fill system. Respondent's Exhibit 37.

H. Stephenson v. NCDENR, lot 66, Hunter's Ridge Subdivision, 00 EHR 1255

1. Petitioner made an application for improvement permit and construction authorization permit dated December 21, 1999, for a wastewater system to serve a three-bedroom manufactured house. (Respondent's Exhibit 8A). Brunswick County conducted a soil/site evaluation of the property on December 29, 1999. Brunswick County found the site to be unsuitable due to soil wetness condition. (Respondent's Exhibit 8B). By letter dated January 11, 2000, Brunswick County informed Petitioner that the site was unsuitable due to soil wetness condition and insufficient space for septic system and repair area. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 8G). Petitioner submitted a site monitoring well application dated December 30, 1999. (Respondent's Exhibit 8F). Brunswick County conducted well monitoring of the site. (Respondent's Exhibit 8L).

2. By letter dated May 2, 2000 and attached documents, Land Management Group stated that the soil wetness condition was 34" at one well, and 29" at another well. (Respondent's Exhibit 8H). Petitioner used the 21 day equivalency to chroma II or less as its measure of soil wetness. (Respondent's Exhibit 8H at 5). By letter dated July 24, 2000, Brunswick County informed Petitioner that the application for permit was denied, and of his right to appeal. (Respondent's Exhibit 8J). Petitioner filed his appeal on August 25, 2000. By letter dated January 12, 2001, NCDENR stated that the soil wetness condition was 8 inches below the existing soil surface. NCDENR's interpretation of the monitoring well data was that the soil wetness condition was at 12" below the natural soil surface. (Respondent's Exhibit 8K at 2-3). NCDENR amended the January 12 letter in an affidavit admitted into evidence at trial to state that the available option for wastewater treatment is "Pretreatment (Type B) to provide a minimum of 9 inches in vertical separation of bottom of trench to soil wetness and (a) pump to a low pressure pipe drainfield or (b) pump to a conventional drainfield in a fill system." (Respondent's Exhibit 37 at 1).

I. Stephenson v. NCDENR, lot 81, Hunter's Ridge Subdivision, 00 EHR 1876

1. By application dated May 29, 1999, Tom Stephenson applied for an improvement permit and construction authorization permit for a wastewater system to serve a three-bedroom manufactured house. (Respondent's Exhibit 9A). On June 16, 1999, Brunswick County conducted a soil/site evaluation of lot 81, and found it to be unsuitable for a wastewater permit. (Respondent's Exhibit 9B). By letter dated June 16, 1999, Brunswick County informed Petitioner that the site was unsuitable due to unsuitable topography and/or landscape position, 15A N.C.A.C. 18A 3 .1940; unsuitable soil characteristics, 15A N.C.A.C. 18A 3 .1941; soil wetness condition less than 12" below naturally occurring soil surface as indicated by observations of soil color, 15A N.C.A.C. 18A 3 .1942, and insufficient space for septic system and repair area, 15A N.C.A.C. 18A 3 .1945. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 9C).

2. On December 30, 1999, Petitioner through John Williams, Land Management Group, submitted a site monitoring well application. (Respondent's Exhibit 9D). By letter dated January 7, 2000, Land Management Group by John Williams, stated to Brunswick County that wells had been installed on the site, as reflected on an attached map, and that Land Management Group "intends to show that the actual depth to soil wetness condition is deeper than the soil colors indicate, thereby allowing our client to receive improvement permits on these sites." (Respondent's Exhibit 9E).

3. By letter dated May 2, 2000, Land Management Group submitted hydrographs regarding the lot and the assertion in a cover letter that the soil wetness condition in three wells was 34", 32", 34" respectively. Neither the letter nor the documents was signed or sealed by a licensed soil scientist. (Respondent's Exhibit 9F). Brunswick County performed well monitoring and recorded results that showed soil wetness for example, at levels of 15", 18", 13.5", 24.5", 27", 22.5". Respondent's Exhibit 9H.

4. By letter dated November 2, 2000, Brunswick County informed Petitioner that, based on the monitoring well data submitted by Land Management Group, the soil wetness condition for the lot is 14" below the natural soil surface. Brunswick County stated that plans for a pre-treatment-to-conventional drainfield or a pre-treatment-to-low pressure pipe drainfield wastewater system to serve a three-bedroom manufactured home could be submitted for review. (Respondent's Exhibit 9I). Petitioner filed his appeal on November 19, 2000.

5. By letter dated January 19, 2001, NCDENR informed Brunswick County that the soil wetness was observed at 7" below the soil surface. Based on the Petitioner's monitoring well data, the soil wetness condition was found to be at 17" below the soil surface. (Respondent's Exhibit 9J). By affidavit admitted into evidence at the hearing, NCDENR amended its letter regarding the available option, and stated, "Pretreatment (Type B) to provide an increase in the Long Term Acceptance Rate by a factor of 2 and pump to a low pressure pipe drainfield in a fill system." (Respondent's Exhibit 37).

J. Stephenson v. NCDENR, lot 79, Hunter's Ridge Subdivision, 00 EHR 1877

1. Petitioner filed an application for improvement permit and construction authorization permit dated May 28, 1999, for a three bedroom manufactured house at lot 79, Hunter's Ridge Subdivision, Town Creek, North Carolina. (Respondent's Exhibit 10A). On June 16, 1999, Brunswick County performed a soil evaluation of the lot and found it to be unsuitable because of soil wetness condition less than 12 inches from the soil surface. (Respondent's Exhibit 10B). Brunswick County sent a letter to Petitioner dated June 16, 1999, informing him that the application for improvement permit was denied due to soil wetness condition less than 12" below the naturally occurring soil surface; and due to a restrictive horizon. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 10C).

2. Petitioner filed a site monitoring well application signed by John Williams, Land Management Group and dated December 30, 1999. (Respondent's Exhibit 10D). By letter dated January 7, 2000, John Williams, Land Management Group, stated that monitoring wells had been installed, and that "LMG intends to show that the actual depth to soil wetness condition is deeper than the soil colors indicate, thereby allowing our client to receive improvement permits on these sites. (Respondent's Exhibit 10E). Brunswick County conducted spotcheck well monitoring. (Respondent's Exhibit 10H). By letter dated May 2, 2000, Land Management Group asserted that the soil wetness condition based on interpretation of the attached hydrographs was 40" in one well and 38" in another well. Neither the cover letter nor attached hydrographs were signed or sealed by a licensed soil scientist. The soil wetness condition was determined by use of the method employed by Land Management Group which asserts that 21 days of consecutive/cumulative soil saturation is equivalent to colors of chroma 2 or less. (Respondent's Exhibit 10F).

3. By letter dated November 2, 2000, Brunswick County informed Petitioner that a permit for a pre-treatment-to-conventional drainfield or a pre-treatment to low pressure pipe drainfield wastewater system could be issued, and of his right to appeal this decision. (Respondent's Exhibit 10I). Petitioner filed his appeal on November 22, 2000. By letter dated January 18, 2001, NCDENR stated that soil wetness was observed at 8 inches below the soil surface; from the monitoring well hydrograph, the soil wetness condition was determined to be at 21 inches below the soil surface. (Respondent's Exhibit 10J). NCDENR stated that two options were appropriate for this lot: 1) Pre-treatment (Type B) to provide a minimum of 9 inches in vertical separation of bottom of trench to soil wetness and pump to a conventional drainfield, 2) Pretreatment (Type B) to provide an increase in the Long Term Acceptance Rate by a factor of 2 and pump to a low pressure pipe (LPP) drainfield, 3) Pump to a LPP drainfield, 4) Purchase other property with suitable soils for a wastewater system and pump the effluent off-site from lot 79; and 5) obtain an easement to other property with suitable or provisionally suitable soils to place the ground absorption system, and pump the effluent off-site. Respondent's Exhibit 10J at 3.

K. Stephenson v. NCDENR, lot 89, Hunter's Ridge Subdivision, 00 EHR 1878

1. Petitioner filed an application for improvement permit and construction authorization permit dated May 28, 1999, for a three bedroom manufactured home, for lot 89, Hunter's Ridge Subdivision, Town Creek, North Carolina. (Respondent's Exhibit 11A). On September 14, 1999, Brunswick County performed a soil evaluation of the property and concluded that it was unsuitable for installation of a wastewater system due to soil wetness condition less than 12 inches from the soil surface; restrictive horizon; insufficient space; and unsuitable fill material. (Respondent's Exhibit 11B). By letter dated October 5, 1999, Brunswick County informed Petitioner that lot 89 was unsuitable due to unsuitable soil characteristics, soil wetness condition; restrictive horizon; insufficient space for septic system and repair area, and unsuitable fill material. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 11C).

2. Petitioner filed a site monitoring well application dated December 30, 1999. (Respondent's Exhibit 11K). Brunswick County conducted spotcheck well monitoring. (Respondent's Exhibit 11E). By letter dated May 2, 2000, Petitioner through Land Management Group, in a cover letter and document including a hydrograph that were unsigned and unsealed by a licensed soil scientist, asserted that the soil wetness condition was at "40-fill," and that there was not a restrictive horizon. In reaching this conclusion, Petitioner used its method of treating 21 days of consecutive/cumulative saturation as equivalent to colors of chroma II or less. (Respondent's Exhibit 11L).

3. By letter dated November 2, 2000, NCDENR and Brunswick County stated that the hydrographs do not support the issuance of an Improvement Permit, and informed him of his right to appeal this decision. (Respondent's Exhibit 11L1). Petitioner filed his appeal on November 22, 2000. By letter dated January 19, 2001, NCDENR informed Brunswick County that evidence of the soil wetness condition was observed at 9 inches below the natural soil surface; and that the hydrograph showed that the soil wetness condition was 15" below the natural soil surface. (Respondent's Exhibit 11M). NCDENR concluded that Petitioner could use pre-treatment (type B) to provide an increase in the Long Term Acceptance Rate by a factor of 2 and pump to a convention drainfield in a fill system, or pump to an LPP drainfield in a fill system. NCDENR further concluded that Petitioner could purchase or obtain an easement to property on which he could place the wastewater and disposal system. He could then pump the effluent off-site.

L. Stephenson v. NCDENR, lot 80, Hunter's Ridge Subdivision, 00 EHR 1881

1. Petitioner filed an application for an improvement permit and construction authorization permit dated May 28, 1999, for lot 80, Hunter's Ridge Subdivision, for a three bedroom manufactured home. (Respondent's Exhibit 14A). On June 16, 1999, Brunswick County performed a soil evaluation at the site and determined that the site was unsuitable for a wastewater system due to soil wetness condition and hardpan. (Respondent's Exhibit 14B). By letter dated June 16, 1999, Brunswick County informed Petitioner that the site was unsuitable due to soil wetness condition less than 12" below the naturally occurring soil surface; and presence of restrictive horizon. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 14B1). By letter dated November 2, 2000, Brunswick County informed Petitioner that lot 80 could have a permit for a pre-treatment-to-conventional drainfield or a pre-treatment-to-Low Pressure Pipe drainfield wastewater system and that he had a right to appeal this decision. (Respondent's Exhibit 14H). Petitioner filed his appeal on November 22, 2000.

2. Petitioner filed a site monitoring well application dated December 30, 1999. (Respondent's Exhibit 14C). By letter dated January 7, 2000, Land Management Group by John Williams stated that it had installed monitoring wells and intended to show that the depth to soil wetness conditions is deeper than the colors indicate, thereby allowing their clients to receive improvement permits on this site. (Respondent's Exhibit 14D). Brunswick County conducted spotcheck well monitoring. (Respondent's Exhibit 14G).

3. By letter dated January 19, 2001, NCDENR informed Brunswick County that the soil wetness condition was observed at 8 inches below the soil surface. From the monitoring well data, the soil wetness condition was determined to be at 17" below the soil surface. (Respondent's Exhibit 14I). By affidavit admitted into evidence, NCDENR amended the list of options available to state that the option available was "Pretreatment (Type B) to provide an increase in the Long Term Acceptance Rate by a factor of 2 and pump to a low pressure pipe drainfield in a fill system." (Respondent's Exhibit 37).

M. Acreage Brokers, Doug Golightly v. NCDENR, lot 37, Red Oak, 00 EHR 1214

1. Petitioner submitted an application for improvement permit dated February 24, 1998 for a three bedroom manufactured house for lot 37, an undrained site, Red Oak, Hooper Hill area, North Carolina. (Respondent's Exhibit 15A). On March 31, 1998, Brunswick County conducted a soil evaluation of the lot, and concluded that it was unsuitable due to morphology; soil wetness condition; and failure to meet setback requirements. (Respondent's Exhibit 15A1). By letter to Petitioner dated April 13, 1998, Brunswick County informed Petitioner that the application for improvement permit was denied due to unsuitable soil characteristics; soil wetness condition; insufficient space for septic system and repair area; and unsuitability for meeting required setbacks. (Respondent's Exhibit 15B).

2. Petitioner submitted a second application for improvement permit dated June 2, 1999. (Respondent's Exhibit 15C). On June 24, 1999, Brunswick County conducted a soil evaluation of the lot and concluded that it was unsuitable due to soil characteristics; soil wetness condition; and insufficient space for septic system and repair area. (Respondent's Exhibit 15D). By letter dated June 24, 1999, Brunswick County informed Petitioner of the denial of the application for the foregoing reasons. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 15E).

3. Petitioner requested a second soil evaluation, which was conducted on November 9, 2000. Brunswick County again determined that the site was unsuitable due to soil wetness condition less than 12" from the soil surface and insufficient space for a septic system and repair area. (Respondent's Exhibit 15G).

4. By letter dated December 9, 1999, Brunswick County informed Petitioner that the site was unsuitable for a wastewater system due to soil wetness condition less than 12 inches below the naturally occurring soil surface as indicated by visible observations of soil color; and insufficient space for a septic system and repair area. (Respondent's Exhibit 15H). Petitioner submitted a site monitoring well application dated December 20, 1999. (Respondent's Exhibit 15I). Brunswick County conducted spotcheck monitoring of the wells, which reflected readings of 17", 6", 2", 12", 17", 13", 23", among others. (Respondent's Exhibit 15K).

5. By letter dated April 27, 2000, Land Management Group proposed a conventional fill mound system, and stated that the seasonal high water table was at 23" based on the 21 day continuous saturation as equivalent to chroma 2 or less color formation. The letter was signed by Tom Gulley, Land Management Group; and one site plan was sealed by Craig Turner, a licensed soil scientist. On the site plan for the proposed system, the soil type is indicated as "Leon," (commonly unsuitable due to restrictive horizon per Uebler testimony, T p. 181-183) (Respondent's Exhibit 15L at 1 and at 6). Land Management Group did not submit any substantiating data as required by Rule .1948(d) to justify a reclassification of the site. Rule .1942 did not apply since the site is undrained.

6. Even though no substantiating data was submitted by Petitioner, Respondent reviewed the hydrograph and by letter dated

July 24, 2000, informed Petitioner that, the application for permit was denied due to soil wetness, and of the right to appeal this decision. Respondent's Exhibit 15M. Petitioner filed his appeal on September 5, 2000.

7. By letter dated January 22, 2001, NCDENR informed Brunswick County that the soil wetness condition was less than 9 inches below the soil surface. Based on the monitoring well hydrographs, the soil wetness condition was determined to be at 7 inches below the soil surface. NCDENR stated that pumping the effluent off-site would be required. (Respondent's Exhibit 15N).

N. Albert Galluzzo v. NCDENR, lot 30, Sandy Creek Acres, 00 EHR 1245

1. Petitioner submitted an application for improvement permit dated September 3, 1997, for a three-bedroom manufactured house. (Respondent's Exhibit 16A). On September 8, 1997, Brunswick County conducted a soil evaluation of the property and determined that it was unsuitable for a wastewater system due to type of soil morphology, soil wetness condition, insufficient space for system and repair area, and insufficient setbacks. Respondent's Exhibit 16B. By letter dated March 2, 1998, Brunswick County informed Petitioner that the application for permit was denied due to unsuitable topography and/or landscape position; unsuitable soil characteristics; soil wetness condition less than 12" below the naturally occurring soil surface; insufficient space for septic system and repair area; and unsuitable for meeting required setbacks. Brunswick County informed the Petitioner of the option to submit site-specific data and a system design to the health department for technical review pursuant to Rule .1948(d), and of his right to appeal the denial of the permit. (Respondent's Exhibit 16D). By letter dated March 9, 1998, Petitioner requested a second opinion on the site evaluation. (Respondent's Exhibit 16E). Brunswick County conducted a soil evaluation on March 26, 1998, and determined that the site was unsuitable due to soil wetness condition; soil characteristics, and insufficient space for septic system and repair area. By letter dated March 31, 1998, Brunswick County informed Petitioner of its determinations. (Respondent's Exhibits 16F, 16G).

2. Petitioner by Land Management Group submitted an application for well monitoring dated October 26, 1999. (Respondent's Exhibit 16I). By letter dated April 28, 2000, signed by Tom Gulley, Land Management Group, and with one attached site plan sealed by Craig Turner, a licensed soil scientist, Land Management Group stated that the soil wetness condition was 32" at one well; 36" at another well; and 40" at yet another well. Petitioner used the 21 day continuous saturation as equivalent to formation of colors of chroma 2 or less method in making its conclusions. (Respondent's Exhibit 16J). Brunswick County simultaneously conducted spotcheck well monitoring. Respondent's Exhibit 16K.

3. By letter dated July 24, 2000, Brunswick County and NCDENR informed Petitioner that the site was unsuitable for an on-site wastewater system, and that he had the right to appeal this decision. (Respondent's Exhibit 16L). Petitioner filed his appeal on August 21, 2000. By letter dated January 22, 2001, NCDENR informed Brunswick County that evidence of the soil wetness condition by soil morphology was observed at 6 inches below the soil surface. Further, from the monitoring well hydrographs, the soil wetness was determined to be at 6 inches below the soil surface. Pumping the effluent off-site would be required. (Respondent's Exhibit 16M).

21. Dr. David McCloy and Dr. Robert Uebler both were qualified as experts in soil science and both testified in opposition to Land Management Group's method of applying a 21 day continuous saturation standard as equivalent to the period required for the formation of chroma 2 or less colors. Respondent additionally offered opposition expert testimony of soil science experts Steve Steinbeck and Steve Berkowitz, both of whom testified by means of affidavits, under stipulation, that the 21 day saturation standard might not protect the public health or environment because of effluent contact with high water in the nitrification trenches. Respondent's opposition principally is based on Rule .1961 which generally prohibits contact between sewage effluent and groundwater for more than two (2) days.

22. Rule .1961 applies, on its face, to existing systems, not applications for new systems. Rule .1939 provides that site evaluations for new systems shall encompass the requirements contained in rules .1940 through .1948.

23. Respondent's present rule .1942 establishes a soil wetness condition on an undrained site evaluation anywhere in the State as that depth which shows a certain percentage of mottles of chroma 2 or less colors according to the Munsell color chart. This chroma 2 standard as it is called, does not depend upon or use the prohibition contained in rule .1961 against the possibility of contact between the effluent and groundwater.

24. In trying to decide how to handle Petitioners' improvement permit applications and ensuing monitoring well data, Respondent has proceeded through six (6) different drafts of how to interpret and apply rule .1942 in the case of monitoring well data. The last draft discussed during the testimony in these consolidated case hearings was to provide for a 14 day continuous saturation period as equivalent to the period required to form chroma 2 or less colors.

25. Petitioners provided the expert testimony of John Williams, soil scientist, in support of the 21 day equivalency method for establishing soil wetness conditions. Dr. Michael Vepraskas, professor of soil science at N.C. State University, testified as an expert

soil scientist and as expert in determining where anaerobic conditions exist in soils. He testified that the 48 hour standard employed in this case by Respondent for hydrograph interpretation is arbitrary for all soils; is not in general use anywhere in the United States of America; and was just pulled out of the blue. Dr. Vepraskas testified that it was his opinion that it takes 21 days of continuous saturation, on average, for soils to develop mottles of chroma 2 or less color.

26. Dr. David Lindbo, professor of soil science at N.C. State University, testified as an expert in this contested case hearing. He is a consultant to Respondent's Onsite Wastewater Section and presently serves as chairman of its committee on .1900 rules. Dr. Lindbo testified that the core of rule .1942 is the chroma 2 standard which must be correlated with monitoring well data in the determination of soil wetness conditions on hydraulically altered sites such as Petitioners' sites. He testified that Respondent's use of the highest peak on hydrographs 48 hours after a rainfall event is not an accurate method of identification of the true seasonal high water table or soil wetness condition. Dr. Lindbo advocates the use of the 21 day continuous saturation standard as equivalent to the chroma 2 standard which long has been used by Respondent under the first sentence of rule .1942.

27. In a letter to John Williams of Land Management Group, dated February 12, 2001, Dr. Lindbo provided the following pertinent commentary relevant to the present controversy:

The present method using 2-chroma colors to determine soil wetness does not address the system performance, or more specifically, how long the zone beneath the trench or the trench itself can be saturated and still adequately treat the wastewater. Unfortunately, there is little data that I am aware of that adequately addresses this question. However, if it is assumed that the depth to soil wetness condition based on 2-chroma colors allows for the siting and design of on-site systems that protect public health then any other method that is at least as conservative also should protect public health. A comparison at individual, undrained, unmodified sites of the 2-chroma versus the 21 day saturation soil wetness condition has shown the 21 day saturation soil wetness is the same or shallower (closer to the ground surface) than the 2-chroma soil wetness condition. Although this comparison is not a direct measure of how a system will perform it should serve as a basis for consideration.

Both 2-chroma color and 21-day saturation reflect long term or long duration events. Water levels in the soil are by nature more dynamic than either of these methods suggest. Short duration spikes of the water table due to individual rainfall events may affect septic system performance, but to the best of my knowledge little research has been done investigating this potential problem, thus my discussion of this potential problem should be considered as a hypothesis only. Based on hydrographs from numerous sites it is unmistakable that the peak water table extends 12 inches or more above the 2-chroma colors in most natural soils. This would result in the water table being within the trench for at least a portion of the wet season on sites where soil wetness is based on 2-chroma color. Since the 2-chroma color can be related to 21-day saturation periods it is likely that the water table would rise above the level of 21-day saturation as well. However, if a 21-day period of saturation is used in assigning the soil wetness condition it should have the same impact as soil wetness based on 2-chroma colors as the two methods have been shown to give similar results in natural, undrained areas.

**CONCLUSIONS OF LAW**

Based on the foregoing findings of fact, I make the following conclusions of law:

1. The Office of Administrative Hearings has subject matter jurisdiction over this matter under N.C. Gen. Stat. Chapter §150B. "The subject matter of a contested case hearing by the Administrative Law Judge is an agency decision. Under N.C. Gen. Stat. §150B-23(a), the Administrative Law Judge is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. G.S. §150B-23(a)." Britthaven, Inc. v. North Carolina Dept. of Human Resources, Div. Of Facility Services, 118 N.C. App. 379, 455 S. E. 2d 455 (1995).
2. The parties properly are before the Office of Administrative Hearings.
3. During a pre-trial motions hearing, Respondent's motions to dismiss under N.C.R. Civ. R. 12(b)(6) for failure to state a claim on which relief could be granted as to cases 00 EHR 1879 and 00 EHR 1880 were allowed because shallow conventional wastewater system permits or a low pressure pipe system permits had been granted for both lots in question, and, therefore, there was no agency action denying a permit for either lot. Based on the ruling made on these motions, no evidence was taken regarding these two lots during the contested case hearing. Respondent's decisions in these two cases should be affirmed.
4. Respondent's action in 00 EHR 1214 should be affirmed to the extent that Respondent's decision is based upon, among other factors, soil evaluations under the first sentence of Rule .1942, since this site is not hydraulically altered so as to bring it under the purview of the second sentence of the rule regarding drained, hydraulically altered, sites.

**CONTESTED CASE DECISIONS**

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5. In the contested cases other than 00 EHR 1879, 00 EHR 1880, and 00 HER 1214, Respondent's agency action, although taken in good faith, is erroneous as a matter of law because it reflects an attempt on the part of Respondent to amend Rule .1942 from the existing chroma 2 or less color standard to a new standard which seeks to incorporate elements such as transitory effluent/peak groundwater contact time from other rules such as Rule .1961. Both temporary and permanent rulemaking avenues remain open to Respondent if it believes Rule .1942 needs revision to bring it into compliance with Respondent's policies as applied in these cases.

**6. The evidence taken in these contested cases is sufficient to support a decision that the chroma 2 or less color standard is the standard in North Carolina and that, for drained sites under the second sentence of Rule .1942, a chroma 2 or less equivalent standard is proper. Although expert testimony supports an equivalency standard of 21 days of continuous saturation, a 14 day continuous saturation period defining a seasonal high water table is observed by the United States Department of Agriculture, Natural Resources Conservation Service, is a more conservative standard and may, at this time in the development of chroma 2 standard equivalency methodology, provide greater protection to the environment.**

**RECOMMENDED DECISION**

Based upon the foregoing findings of fact and conclusions of law, it hereby is recommended that Respondent reconsider its actions in these contested cases, not disposed of by motions, by reviewing each remaining site using a 14 day continuous saturation equivalency standard and to take such further action as the reviews dictate from the existing hydrographs and other pertinent data.

The State Health Director, North Carolina Department of Health and Human Services will make the Final Decision in this contested case.

**ORDER**

It is hereby ordered that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, Mail Service Center 6414, Raleigh, N. C., in accordance with North Carolina General Statutes §150B-36(b).

**NOTICE**

Before the agency makes the Final Decision, it is required by N.C. Gen. Stat. §150B-36() to give each party an opportunity to file exceptions to this Recommended Decision, and to present written arguments to those in the agency who will make the final decision.

The agency is required by N.C. Gen. Stat. §150B-36(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the parties' attorneys of record.

This the 7<sup>th</sup> day of August, 2001.

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Beecher R. Gray  
Administrative Law Judge

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
00 EHR 1288

COUNTY OF HYDE

Sammie Williams and Williams Seafood, Inc.  
Petitioner,

vs.

North Carolina Department of Environment and Natural  
Resources, Division of Coastal Management  
Respondent.

RECOMMENDED DECISION

A contested case hearing was held in this matter on March 29, 2001, in Belhaven, Hyde County, North Carolina, before the Honorable Beecher R. Gray, Administrative Law Judge. The Petitioners Sammie Williams and Williams Seafood, Inc. were represented by Lars P. Simonsen of the law firm of Pritchett & Burch, PLLC. The Respondent Department of Environment and Natural Resources was represented by Meredith Jo Alcoke, and Dave Heeter, of the North Carolina Department of Justice, Attorney General's Office. Prior to the contested case hearing, pursuant to a motion filed by the Petitioner, Judge Beecher Gray visited the property which is the subject of this case with Lars P. Simonsen and Meredith Jo Alcoke as well as Terry Moore, David Moye, and Tracie Wheeler of the Division of Coastal Management.

**ISSUES**

The Parties agreed that the issues in this contested case are as follows:

1. Whether the Division deprived the Petitioners of property or otherwise substantially prejudiced the Petitioners' rights, and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously or failed to act as required by law or rule by denying the Petitioners' application for a permit under the Coastal Area Management Act and the North Carolina Dredge and Fill law
2. Does the area to be filled pursuant to Petitioners' permit application constitute a coastal wetland?
3. If so, is petitioners' proposed use an acceptable use in coastal wetlands?
4. If so, is petitioners' proposed development consistent with Hyde County's Land Use Plan?

**STIPULATIONS**

The parties entered the following stipulations on the record in this contested case:

1. It is stipulated that all parties properly are before the Court, that the Court has jurisdiction of the parties and the subject matter, and that this hearing properly was noticed.
2. It is stipulated that all parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.
3. The Petitioner Williams Seafood, Inc. is a corporation organized under the laws of the State of North Carolina, with an office in Engelhard, Hyde County, North Carolina.
4. The Petitioner Sammie Williams is a citizen and resident of Hyde County, North Carolina, and is the owner and operator of Williams Seafood, Inc.
5. The Petitioners are engaged in the commercial fishing business, owning and operating a fishery located on Far Creek in Engelhard, Hyde County, North Carolina.
6. Several other commercial fishing operations are located on Far Creek.

**CONTESTED CASE DECISIONS**

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7. On November 15, 1999, the Petitioners applied for a Major Permit under the Coastal Area Management Act (CAMA) and the State Dredge and Fill Law.

8. Petitioners sought a permit allowing the construction of a 60' by 100' freezer building with a 16' by 100' loading platform on a tract of land located on the southwest corner of the intersection of N.C. State Road 1102 and N.C. State Road 1101 in Engelhard, Hyde County, North Carolina (hereinafter "the Property").

9. The Property is bordered on the North and East by paved roads and on the South by a property line ditch.

10. The Division of Marine Fisheries has designated Far Creek as a Primary Nursery Area, but the area is not open to shellfishing.

11. At one time, a house was located on the Property.

12. In the Petitioners' permit application, Petitioners propose to fill an area of the Property approximately .44 acres in size for the construction of a freezer building.

13. Respondents contend that Petitioners' proposed development will result in the filling of 9600 square feet (.22 acres) of coastal wetlands.

14. Respondent has designated an area on the project site as non-wetlands that measures approximately 6864 square feet.

15. By letter dated August 14, 2000, the Respondent denied Petitioners' permit application.

16. Petitioners have the burden of proving that the respondent has deprived the petitioner of property, or has otherwise substantially prejudiced the petitioner's rights and that the respondent:

- (a) Exceeded its authority or jurisdiction;
- (b) Acted erroneously;
- (c) Failed to use proper procedure;
- (d) Acted arbitrarily or capriciously; or
- (e) Failed to act as required by law or rule.

**FINDINGS OF FACT**

1. Pursuant to a Motion for Judicial Notice filed by the Petitioners pursuant to Rule 201 of the North Carolina Rules of Evidence, the undersigned takes judicial notice of the following facts:

a. On March 20 and 21, 2001 a Northeaster passed over Northeastern North Carolina.

b. According to the National Weather Service, the storm had winds from the northeast to east which had gusts of 50 miles per hour and sustained winds of approximately 40 miles per hour in the Pamlico Sound.

c. A Coastal Flood Watch had been issued by the National Weather Service for Hyde County. The National Weather service forecast tides 3-4 feet above normal.

d. According to the National Weather Service radar, the storm dropped 1 to 1.5 inches of rain in Engelhard.

2. The Petitioner Williams Seafood, Inc. is the owner of the Property by virtue of the deed recorded in book 153 page 062 of the Hyde County Public Registry, a copy of which is a part of Petitioner's Exhibit (hereinafter P.Ex.) 11.

3. The Property is bounded on the north by S.R. 1101, and on the east by S.R. 1102. A roadside ditch runs adjacent to S.R. 1102. The property is bounded on the south by a property line ditch. P.Ex. 11, P. Ex. 1. Several small ditches or drains are located on the Property. (P.Ex. 1, 2, 3).

4. The Property was previously used as a residential lot (P.Ex. 1 and 2; Transcript Page, hereinafter "T.p.", 64), was used for commercial purposes for storing trucks and equipment (T.p. 65) and was the location for a circus. (T.p. 64). The Petitioners have used

the Property in connection with their fishery operation for the storage and maintenance of equipment and the Property was being used for that purpose on the date of the undersigned's site visit.

5. The Petitioners' proposed project would cover approximately 0.44 acres of the Property, and would involve the placement of approximately eight inches of crushed rock in 0.20 acres (+/- 9600 square feet) of that 0.44-acre area. P.Ex. 11. Respondent contends that the 9600 square feet to be filled constitute Coastal Wetlands. Respondent's Exhibit (hereinafter "R.p.") 2, 3. The 0.44 acres to be developed pursuant to the Petitioners' permit application (which area is hereinafter referred to as "the Project Area") consists of the eastern most corner of the Property. P.Ex. 11, R.Ex. 12. Petitioners propose to leave a twenty-foot wide vegetative buffer along the roadside ditch which runs adjacent to S.R. 1102. P. Ex. 11, R. Ex. 12. There is no parking lot or paved area proposed. P.Ex. 11.

6. Portions of the Project Area are vegetated by coastal wetlands plant species. *Spartina Alterniflora* grows along the edge of the roadside ditch adjacent to S.R. 1102, and in the drain forming the western most boundary of the Project Area. T.p. 90, 127. *Distichlis Spicata* and *Spartina Patens* were also found in the project area. T.p. 90, 127. David Moye testified in his deposition that he had also found *Juncus Roemerianus* and *Scirpus* in the Project Area, but admitted at the hearing that *Juncus Roemerianus* was not present in the Project Area, and that he found no *Scirpus* on the Property. T.p. 128.

7. Other plant species that commonly are not found in Coastal Wetlands are also present on the Property and in the Project Area. These plants include Fescue Grass (T.p. 128), Baccharis (T.p. 128), wax myrtle, goldenrod and cedar trees (T.p. 125).

8. The Project Area is not subject to regular or occasional flooding by tides:

a. Sammie Williams testified that he was aware of only one occasion, in February of 1998, that the Property was flooded by tidewater other than as a result of Hurricanes. T.p. 66-67. Mr. Williams further testified that he saw the Property at least four days a week. T.p. 66-67.

b. Terry Moore testified that the Property is not regularly flooded by tides, and is not flooded by lunar tides. T.p. 95-96. Mr. Moore testified that only wind tides would flood the Property, but that the Property was protected from the winds. T.p. 95.

c. Mr. Moore testified that he had a record of seeing the Property flooded by tidewater only one time. T.p. 88-89. He took a photo of the flooding on the adjacent property on that date. R.Ex. 15J. Mr. Moore testified that this photo, respondent's exhibit 15J, showed the corner of the site Petitioner proposed to develop. T.p. 164. Mr. Moore also testified that the photo did not show the "marsh that the freezer is going to be on." T.p. 169. Mr. Moore testified that the photo showed that the water was across the ditch along S.R. 1102, but he could not say whether the water was on the portion of the Project Area designated as uplands. T.p. 169. On cross examination, Mr. Moore testified that the photo showed that the water was across the roadside ditch along the western boundary of S.R.1102, and in the fringes of *Spartina alterniflora* along the edge of the ditch. T.p. 193. Mr. Moore also admitted that R. Ex. 15J primarily shows the parcel of land across S.R. 1102 from the Property, and that the elevation of this adjacent property is lower than the elevation of the Property. T.p. 194. Other evidence presented in the case calls into question the truth of Mr. Moore's testimony that Respondent's exhibit 15J shows a portion of the Property or the Project Area. Respondent's exhibits 15B and 15C show a structure on the southern portion of the Property that is not visible on R.Ex. 15J. Similarly, Respondent's exhibit 15F also shows a pile of metal beams in the same location as the structure shown on Exhibits 15B and 15C. This metal structure was also visible on the Property when the undersigned conducted the site visit. The structure and beams shown on these exhibits are well outside of the Project Area, and are not visible on Respondent's Exhibit 15J. Respondent's Exhibit 15J does not show the Property flooded by tidal waters.

d. Mr. Moore testified that he had seen this or other properties flooded numerous times before, but could not recall the dates or the circumstances of flooding. T.p. 89-90. Mr. Moore admitted that the circumstances of the flooding would make a difference as to whether or not the flooding was relevant to whether the Property meets the definition of a coastal wetland. T.p. 89. There is no testimony or other evidence concerning the circumstances of other flooding recalled by Mr. Moore, and that testimony has minimal probative value and is not dispositive of the issue of whether the Property is regularly or occasionally flooded by tides.

e. Mr. Moore further testified that he did not know how many times the Property had been flooded by tides. T.p. 96. He did not know whether the Property was flooded by tides in years 2000, 1999, or 1997. T.p. 97. In his deposition, Mr. Moore testified that he could not testify to the number of times the Property was flooded by tides. P.Ex. 15, page 44.

f. Mr. Moore testified that *Spartina Alterniflora* is a reliable indicator of the mean high water mark, and that based upon the presence of *Spartina Alterniflora* along the ditch bank, the mean high water mark is along the edge of the ditch. T.p. 99-100.

g. David Moyer testified that he had only seen the Property flooded by tides once. T.p. 122, 216-217. He took a photo of the adjacent parcel on that date. T.p. 123, R.Ex. 15E. However, Mr. Moyer admitted that this photo, R.Ex.15E, showed the lowest elevation area of the property across S.R.1102 from the Property. Mr. Moyer admitted the property shown in the photo has been delineated by respondent as having no uplands on it, whereas the Property at issue has been delineated by respondent as having uplands. T.p. 228.

h. David Moyer testified that he did not know how often the Property is flooded by tides. T.p. 123.

i. David Moyer testified that he visited the Property on March 21, 2001 during the Northeaster storm about which the undersigned has taken judicial notice. T. p. 123. Mr. Moyer testified that Steve Trowel, another of the Respondent's field representatives, visited the site on March 20, 2001. T.p. 123. Despite the high-sustained winds produced by this storm, Mr. Moyer did not witness any tidal flooding or any evidence of such flooding on the Property. T.p. 124-125.

j. In his deposition, David Moyer testified that other evidence he relied upon in forming his opinion that the Property is subject to regular or occasional tidal flooding was the presence of wrack lines on the Property. P.Ex. 16, page 16-18. In the contested case hearing, Mr. Moyer denied seeing wrack lines on the Property. T.p. 130. Terry Moore testified that he had never seen a wrack line on the Property. T.p. 100, P.Ex. 15, page 49. Mr. Moore further testified that "it would be a short-sighted person" that would say they had seen a wrack line on the Property. T.p. 101, P.Ex. 15, pg. 50.

k. In his deposition, Mr. Moore testified that in terms of looking at various indicators of occasional tidal flooding, "if you can look at anything else, you better. You better." P.Ex. p. 82. However, Mr. Moore admitted at the contested case hearing that he did not look at the soil type on the property (T.p. 102), and did not measure the elevation of the Property (T.p. 104-105). Mr. Moore testified that a difference in elevation of even one inch might determine whether a property is or is not occasionally flooded by tides. T.p. 105.

l. David Moyer testified that he did not measure the elevation or check the soil type on the Property, or look at the Hyde County Soil Survey. T.p. 132-133. Mr. Moyer testified that elevation of property can be an important factor in determining whether a property is regularly or occasionally flooded by tides. T.p. 133. Mr. Moyer testified that it was not in his job description to dig holes or measure elevation. T.p. 138, 141. He also testified that in delineating Coastal Wetlands he was not required to measure elevation of a parcel. T.p. 138, 141. Terry Moore stated that the CAMA Permit application required the Petitioners to state the soil type for the Property. T.p. 102. Mr. Moore also testified that Petitioners' permit application indicated that the soil type on the Property is Brookman Loam, and that he had no proof to the contrary. T.p. 103. Mr. Moore stated that the Hyde County Soil Survey (P.Ex. 13) indicated that Brookman Loam is a rarely flooded soil. T.p. 104.

m. The Northeaster storm about which the undersigned has taken judicial notice did not produce tidal flooding on the Property. T.p. 123-125, R.Ex. 15G, 15H, 15I. David Moyer and Terry Moore each testified that a prolonged Northeaster was needed in order to cause tidal flooding of the Property. T.p. 174-175, 183. However, there is no evidence regarding the severity or duration of a Northeaster storm needed to produce such flooding. Furthermore, there is no evidence regarding the frequency with which such Northeasters occur.

n. The presence of coastal marsh species on the Property does not constitute evidence of regular or occasional flooding by tidewaters. Although these species outcompete other plant species in coastal marsh environments due to their salt tolerance, even the groundwater in the area of the Property can be saline. T.p. 97. Saturation of the soils on the site by saline groundwater does not cause the site to meet the definition of a coastal wetland. T.p. 86.

9. Hyde County is an economically depressed county. T.p. 21, 25, P.Ex. 12.

10. Commercial fishing is vital to the economy of Hyde County. T.p. 26-28, P. Ex. 12.

11. The commercial fishing industry is a highly regulated industry. T.p. 40. As a result of the State and Federal regulations governing the quantity of a particular species of fish that can be caught, and the seasons when they can be caught, the market is seasonally flooded with fresh fish, causing a decline in the market price for fresh fish. T.p. 41. In order to maximize the selling price of seafood, commercial fisherman must be able to freeze and store their catch so that they will not be forced to sell when prices are

low. T.p. 41. Having a fast freezer and freezer storage facility can determine whether a commercial fisherman makes a profit or does not make a profit. T.p. 42.

12. The fishing industry is directly or indirectly responsible for a large percentage of the jobs in Hyde County. P. Ex. 12, pg. III-64. Commercial fishing constitutes a large portion of the tax base and support for jobs and the industry in Hyde County. T.p. 22. In Engelhard and Hyde County, the profitability of the commercial fishing affects the community as a whole T.p. 43.

13. Far Creek supports several commercial fisheries. T.p. 49. Approximately 150 to 200 commercial fishing boats use Far Creek during the fishing season. T.p. 50.

14. The Petitioners employ 8 full time employees and up to 150 part time employees during the summer months.

15. As testified to by Terry Moore, there is not a lot of new development in Engelhard. T.p. 113.

16. The development proposed by the Petitioners is consistent with the Hyde County Land Use Plan (hereinafter "the LUP"). T.p. 21-38. The LUP provides, in part, and the undersigned find as fact, that:

a. Hyde County supports and encourages fishing-related economic opportunities which provide potential for employment for mainland and Ocracoke Island residents. P.Ex. 12, pg IV-29.

b. Hyde County supports commercial fishing in its waters. P.Ex. 12, pg. IV-29.

c. Hyde County encourages development along Far Creek. P.Ex. 12, pg. IV-31.

d. Hyde County desires to expand its economic base to include industries such as commercial fishing. P.Ex. 12, pg. IV-44.

e. Commercial development and redevelopment is a significant mainland need. P.Ex. 12, pg. xvii.

f. Hyde County supports the recruitment and siting of environmentally compatible industry and commercial establishments on the mainland in areas that are similarly developed or in public or private industrial parks to minimize the sacrifice of prime agricultural lands for such development. P.Ex. 12, pg.xxi.

17. The development proposed by the Petitioners would be of economic benefit to the Petitioners, as well as to the citizens of Engelhard and Hyde County as a whole. The proposed development would:

a. Increase the value of the Property, and therefore increase the tax base of Hyde County.

b. Create economic opportunities for the Petitioners and their employees and prospective employees.

c. Benefit other commercial fisherman by reducing the amount of fresh fish being marketed during periods when such fish are plentiful, thereby reducing the downward pressure on prices during these periods of high supply.

d. Prevent the flow of local money to other counties and other states to pay for freezing, packaging and storing of seafood caught and processed locally.

18. The activities associated with the Petitioners' proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act.

19. Far Creek is dredged and is bulkheaded along much of its banks. T.p. 71, P.Ex. 2, 4, 5 and 6, R.Ex. 15A and 15C. The banks of Far Creek are, and have historically been, substantially developed. T.p. 49-50, 63-66. P.Ex. 1, 2, 4, 5 and 6, R.Ex. 15A, 15B, 15C, 15F and 15H.

20. The proposed development will have no adverse effects on Far Creek. P.Ex. 15, pg. 72.

21. The public benefits of the Petitioners' proposed project clearly outweigh the long-range adverse effects of the project.

22. The Petitioners' proposed project must be located near the water and near his fishery operation to be economically viable. T.p. 41-42, 45-47, 74.

23. The Petitioners do not own other land that is a suitable location for the proposed project. T.p. 69-71, 75. David Moye was unaware of any available alternative sites for the Petitioners' proposed project. T.p. 133. Terry Moore also testified that he did not know of alternatives available to the Petitioners. P.Ex. 15, p. 68.

24. The Petitioners have selected a site and design that will have a minimum adverse impact upon the productivity and integrity of coastal marshland and Far Creek. The Property has historically been developed and used for residential and commercial purposes. The Project Area consists primarily of an area that the parties agree is uplands. Petitioner proposes to leave a 20 foot vegetated buffer between the development and the roadside ditch adjacent to S.R. 1102. P.Ex. 11, T.p. 109, 202. As admitted by Terry Moore, this buffer would stabilize the ditch bank and filter out nutrients in runoff from the Property. T.p. 109.

25. The respondent's proposed design modification to the Petitioners' project is to fill the roadside ditch with dirt. T.p. 109, P.Ex. 15, p. 77. Terry Moore testified that this roadside ditch is part of the estuary, is a rich source of food for juvenile fish and shrimp, and plays an important role in the ecosystem. T.p. 108-109. Terry Moore admitted that this proposed design modification would destroy the estuary functions of the ditch and remove it from the estuarine system. T.p.109. The respondent's proposed design modification would have an adverse impact upon the productivity and biologic integrity of the coastal marshland and the Far Creek estuary and primary nursery area.

26. According to the Respondent, the only alternative uses available to the Petitioners for the use of the Property which would not require a permit is to use the Property to graze pigs or cows, or to construct a 6 foot wide elevated walkway on the Property. T.p. 110-111, P.Ex. 16, p. 28-29. However, the Tar Pamlico Basin Buffer Rules would prohibit Petitioner's use of the Property for such purposes, and would restrict or prohibit development of the portion of the Property which respondent contends is uplands. T.p. 200-201.

**CONCLUSIONS OF LAW**

1. The Property is subject to rare flooding but not subject to regular or occasional flooding by tides, and does not constitute Coastal Wetlands under Title 15A N.C.A.C. 7H.0205 or under N.C.G.S. 113-229(n)(3).

2. The Respondent has deprived the Petitioners of property, and has otherwise substantially prejudiced the Petitioners' rights by denying the Petitioners' permit application.

3. The Respondent acted erroneously in denying the Petitioners' permit application on the grounds that the Petitioner's proposed project required the filling of Coastal Wetlands.

4. The Respondent exceeded its jurisdiction by denying the permit since the Project Area is not within an Area of Environmental Concern.

5. The Respondent's denial of the Petitioners' permit application deprives the Petitioners of their property by prohibiting all practical use and reasonable value of the Property. The Respondent also has thereby violated N.C.G.S. 113A-128 and has exceeded its statutory authority.

6. The Respondent acted arbitrarily or capriciously in its denial of the Petitioners' permit application on the grounds that the proposed project requires the filling of Coastal Wetlands, in that there is insufficient evidence to support a finding that the Property is subject to regular or occasional flooding by tides.

7. The Respondent has failed to act as required by law or rule in that:

a. Even were the Property coastal wetlands, the proposed project does constitute an acceptable use in that it constitutes a Water Dependent Use as that term is used in Title 15A N.C.A.C. 7H.0208(a).

b. The Respondent's interpretation and application of the Use Standards is unreasonable, arbitrary and capricious. Terry Moore testified that the Petitioners' proposed project was inconsistent with the Use Standards in that the proposed use was not a water dependent use. T.p. 154. Terry Moore testified that "obviously from the structure's location it's - - it says not water dependent. It's not water dependent as he's across the street away from the - - away from Far Creek." T.p. 154. Mr. Moore testified as to certain uses that would be considered water dependent uses, but admitted that none of those uses would make sense on the Property. T.p. 155, 187-188.

c. The Respondent's proposed design modification (filling the roadside ditch adjacent to S.R. 1102) has significant adverse impacts upon the environment and upon the productivity and biologic integrity of the Far Creek estuarine system and primary nursery area.

**CONTESTED CASE DECISIONS**

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d. Respondent's rejection of the Petitioners' proposal to mitigate the impacts of the proposed project by maintaining a 20 foot buffer as "gratuitous," (T.p. 202) when viewed in light of Respondent's proposal that Petitioners fill the roadside ditch does not follow the spirit and intent, if not the letter, of the Coastal Area Management Act and the rules promulgated thereunder.

8. The Respondent failed to use proper procedure in the denial of the Petitioners' permit application in that Respondent and its employees failed to conduct an adequate investigation and proper coastal wetlands delineation in that they failed to consider important field indicators relevant to the issue of whether the Property is subject to regular or occasional tidal flooding, such as elevation of the property, and soil types.

9. Even were the Property coastal wetlands, the Respondent acted erroneously, arbitrarily and capriciously in determining that the Petitioners' proposed project was inconsistent with the Hyde County Land Use plan in that Respondent did not consider the text of the Hyde County Land Use plan, and the clear statements of support for development such as that proposed by Petitioners.

10. The location, design, and need for the proposed development, as well as the construction activities involved are consistent with the management objective of the Coastal Area Management Act.

11. There are no reasonable or prudent alternative sites available for the Petitioners' proposed project. No suitable alternative site or location outside of an Area of Environment Concern exists for the Petitioners' use or development and the Petitioners have selected a combination of sites and design that will have a minimum adverse impact upon the productivity and biologic integrity of coastal marshland and the Far Creek estuarine waters and primary nursery area.

12. Even were the Petitioners' proposed project in conflict with the general or specific use standards set forth in Title 15A N.C.A.C. 7H.0208, the permit application should have been granted pursuant to Title 15A N.C.A.C. 7H.0208(a)(3) on the grounds that the activity associated with the proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act, that the public benefits clearly outweigh the long range adverse effects of the project, that there is no reasonable and prudent alternative site available for the project, and that all reasonable means and measures to mitigate adverse impacts of the project have been incorporated into the project design and will be implemented at the Petitioners' expense.

**RECOMMENDED DECISION**

The undersigned recommends that the denial of Petitioners' permit application be reversed, and Petitioners be granted a permit under the Coastal Area Management Act and the Dredge and Fill Law.

**ORDER**

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, NC 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

**NOTICE**

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Coastal Resources Commission.

This the 16<sup>th</sup> day of July, 2001.

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The Honorable Beecher R. Gray  
Administrative Law Judge